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REDUCTION OF PRODUCTION ROYALTIES BELOW STATUTORY MINIMUM RATES*

M-36920

December 11, 1979

Mineral Leasing Act: Royalties

Sec. 39 of the Mineral Leasing Act authorizes the Secretary to reduce the royalty on coal, oil and gas, oil shale, phosphate, sodium, potassium, and sulphur leases in the interest of conservation whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein.

Mineral Leasing Act: Royalties

Sec. 39 of the Mineral Leasing Act authorizes the Secretary to reduce production royalties on coal, oil and gas, phosphate, sodium, potassium, and sulphur leases below the statutory minimum rates established for those minerals.

Mineral Leasing Act: Royalties—Coal Leases and Permits: Royalties

The Federal Coal Leasing Amendments Act of 1975 left in effect the Secretary's authority under sec. 39 of the Mineral Leasing Act to reduce production royalties on coal leases below the statutory minimum rate.

Mineral Leasing Act: Generally—Mineral Leasing Act: Royalties

The initial terms of any new competitive mineral lease must conform to the statutory minimum production royalty rate then applicable to that type of mineral lease. Competitive and noncompetitive mineral leases for coal, phosphate, potassium, sodium, and oil shale are subject to periodic readjustment of their terms and conditions. Such readjustments must conform to the statutory minimum production royalty rates then applicable.

Mineral Leasing Act: Generally—Mineral Leasing Act: Royalties

The lease readjustment process and the sec. 39 royalty reduction process may not be merged into a single process where this would result in a readjusted production royalty rate below the applicable statutory minimum. The sec. 39 determination must be made independently.

Mineral Leasing Act: Generally—Coal Leases and Permits: Leases—Coal Leases and Permits: Royalties—Sodium Leases and Permits: Preference Right Leases—Sodium Leases and Permits: Royalties—Potassium Leases and Permits: Leases—Potassium Leases and Permits: Royalties—Phosphate Leases and Permits: Leases—Phosphate Leases and Permits: Royalties

In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance.

To: Secretary.
From: Solicitor.
Subject: Reduction of Production Royalties Below Statutory Minimum Rates.

The minimum production royalty provisions in sec. 6 of the Fed-

*Not in chronological order.

eral Coal Leasing Amendments Act of 1975, 30 U.S.C. § 207(a) (1976), *as amended*, have focused attention on the Secretary's authority to grant relief from royalty rates in existing and future leases. One of the issues raised is whether or not royalties may be reduced below the prescribed statutory minimum rates. This issue is not limited to coal leases, but arises also with respect to oil and gas and other mineral leases which have minimum production royalty rates prescribed by the Mineral Leasing Act of 1920, *as amended* (the Act).[1]

I have concluded that sec. 39 of the Act, *as amended*, 30 U.S.C. § 209 (1976), permits reduction of production royalty rates below the statutory minimums fixed in other sections of the Act. I have further concluded that any such reduction below the statutory minimum rate may only occur subsequent to the fixing of not less than the minimum rate in the initial terms of the lease itself. On those mineral leases subject to periodic "readjustment," royalties may not be reduced below the prescribed minimums during the readjustment process, but may be reduced thereafter pursuant to sec. 39.

I. Statutory Minimum Production Royalty Rates

A. Coal Leases

The current minimum production royalty rate[2] for coal leases is set out in section 7(a) of the Act, *as amended*, 30 U.S.C. § 207(a) (1976):

> A coal lease * * * shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. * * * Such * * * royalties * * * will be subject to readjustment at the end of * * * twenty years and at the end of each ten-year period thereafter if the lease is extended.

This rate was established by sec. 6 of the Federal Coal Leasing Amendments Act of 1975 (FCLAA). The FCLAA amended sec. 7 of the 1920 Act[3] which had fixed the previous minimum production royalty for coal leases at $.05 per ton.

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[1] The minerals subject to the Act are listed in sec. 1 of the Act, *as amended*, 30 U.S.C. § 181 (1976). They are coal, phosphate, sodium, potassium, oil and gas, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock. Sulphur in Louisiana and New Mexico is also subject to leasing although it does not appear in sec. 1, but was added by the Act of Apr. 17, 1926, 44 Stat. 301, 30 U.S.C. §§ 271–276 (1976). The royalty reduction provisions of sec. 39 of the Act, 30 U.S.C. § 209 (1976), cover only coal, phosphate, sodium, potassium, oil and gas, oil shale, and sulphur. It is with this group of minerals that this opinion is concerned.

[2] This opinion discusses minimum *production* royalty rates under the Act. This term should not be confused with so-called "minimum royalties" which are a production incentive assessed against certain nonproducing leases under various sections of the Act, *e.g.*, sec. 10, 30 U.S.C. § 212 (1976) (phosphate); sec. 17, 30 U.S.C. § 226(d) (1976) (oil and gas). The distinction is recognized in sec. 39 of the Act, 30 U.S.C. § 209 (1976), which authorizes the Secretary to "waive, suspend or reduce" the minimum royalty, but only to "reduce" the production royalty, on a mineral lease.

[3] Act of Feb. 25, 1920, c.85, 41 Stat. 439.

B. Oil and Gas Leases

The minimum production royalty rate for competitive oil and gas leases is fixed by sec. 17(b) of the Act, *as amended*, 30 U.S.C. § 226(b) (1976), at not less than 12½ percent of the amount or value of production. This figure has not changed since 1920.

The royalty rate for noncompetitive oil and gas leases is fixed by sec. 17(c) of the Act, *as amended*, 30 U.S.C. § 226(c) (1976), at a flat 12½ percent. This provision was first enacted as sec. 3 of the Act of Aug. 8, 1946, 60 Stat. 951. This rate serves as both a maximum and a minimum for production royalties on oil and gas leases issued for lands not within the known geologic structure of a producing oil or gas field.

In both cases, the 12½ percent rate has produced little controversy over the years. The typical royalty rate included in competitive leases has averaged well above that figure.

C. Other Mineral Leases

Many of the leasable minerals have no minimum production royalty rate provided for by statute. This is true of several of the minerals subject to the Act, including oil shale, asphalt, and competitively leased sulphur.[4]

Most of the minerals subject to the Act are, however, subject to statutory minimum rates. Phosphates are subject to a minimum production royalty rate of 5 percent of the gross value of the lease output.[5] Sodium leases are subject to a 2 percent minimum rate,[6] as are potassium leases.[7] Preference right (noncompetitive) leases of sulphur lands are subject to a 5 percent flat rate on the gross value of the lease output.[8]

These rates, in the case of phosphates and sodium, were established in 1920 by the original Mineral Leasing Act,[9] and in the case of sulphur and potassium, by statutes passed in 1926 and 1927 respectively.[10]

II. Royalty Reduction Provisions

A. Current Law

In 1946 the previous royalty relief and reduction provisions were consolidated and supplemented by the revision of sec. 39 of the Act, *as amended*, 30 U.S.C. § 209 (1976). This section lays out the circumstances and criteria under which the Secretary may proceed to grant relief to a mineral lessee. The section reads in pertinent part:

> The Secretary of the Interior, for the purpose of encouraging the greatest ulti-

[4] 43 CFR 3503.3–2(a)(1)(i) does, however, set a minimum rate of 5 percent for competitive sulphur leases by regulation. And 43 CFR 3562.3–6(a) sets a minimum rate of $0.25/ton for certain Oklahoma asphalt leases.

[5] 30 U.S.C. § 212 (1976).

[6] 30 U.S.C. § 262 (1976).

[7] 30 U.S.C. §§ 282, 283 (1976).

[8] 30 U.S.C. § 272 (1976).

[9] Act of Feb. 25, 1920, c. 85, §§ 11, 24, 41 Stat. 440, 447.

[10] Act of Apr. 17, 1926, c. 158, § 2, 44 Stat. 301; Act of Feb. 7, 1927, c. 66, §§ 2, 3, 44 Stat. 1057.

mate recovery of coal, oil, gas, oil shale, phosphate, sodium, potassium and sulfur, and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein.

Of particular interest is the breadth of the Secretary's authority upon his finding of necessity. The provision for waiving, suspending or reducing the rental or minimum royalty [11] indicates that Congress intended sec. 39 to override even explicit dollar figures in the Act. The intended relief with respect to his authority to reduce *production* royalties can hardly be any less broad in view of the explicit purpose of this section to encourage production.

B. Prior Law

(1) Former 30 U.S.C. § 226 (1940)

The first royalty relief provision was enacted as part of sec. 17 of the Mineral Leasing Act of 1920.[12] That section, after providing for a minimum production royalty rate of 12½ percent for competitive oil and gas leases, went on to provide:

Whenever the average daily production of any oil well shall not exceed ten barrels per day, the Secretary of the Interior is authorized to reduce the royalty on future production when in his judgment the wells can not be successfully operated upon the royalty fixed in the lease.

This provision marks the first appearance of the requirement that in order to grant relief the Secretary must find that the wells cannot be otherwise successfully operated. It was, however, a very limited relief provision, applying only to small operations on oil leases. No such limitation appeared in a 1935 amendment to sec. 17 which added the following relief provision for gas leases:

[I]n the case of leases valuable only for the production of gas the Secretary of the Interior upon showing by the lessee that the lease cannot be successfully operated upon such rental or upon the royalty provided in the lease, may waive, suspend, or reduce such rental or reduce such royalty.[13]

The requirement that the lease be a small production operation was not extended to gas wells. The Secretary was empowered to grant relief to *any* gas lessee upon the lessee's *showing* that he could not otherwise operate successfully. These two relief provisions of sec. 17 were replaced in 1946 with the revision and consolidation of all relief provisions in sec. 39, 30 U.S.C. § 209 (1976).

(2) Former 30 U.S.C. § 209

The first relief provision of *general* applicability to appear was sec. 39 of the Mineral Leasing Act, enacted in 1933.[14] As enacted, sec.

[11] *See* note 2, *supra*.

[12] Act of Feb. 25, 1920, c. 85, § 17, 41 Stat. 443, codified at former 30 U.S.C. § 226 (1940).

[13] Act of Aug. 21, 1935, c. 599, § 1, 49 Stat. 676–677.

[14] Act of Feb. 9, 1933, c. 45, 47 Stat. 798.

39 merely provided for the suspension of acreage *rental* payments when the Secretary, "in the interest of conservation," directed or allowed suspension of coal, oil, or gas lease operations. This provision for relief "in the interest of conservation" has remained as one of the criteria for *royalty* reductions in all subsequent revisions of sec. 39.

In 1946 Congress amended sec. 39 to essentially its present form, combining and consolidating the relief provisions from sec. 17 and sec. 39, and expanding the Secretary's authority.[15] This revision eliminated differing standards for oil wells producing more or less than ten barrels per day, and separate criteria for reducing and suspending rental payments royalties on leases valuable only for the production of gas. For the first time there were also provisions for royalty reductions on coal leases. Specific criteria were established for the granting of all royalty reduction relief. The criteria of "in the interest of conservation" and "whenever * * * the leases cannot be successfully operated" were adopted from the earlier secs. 17 and 39 and made applicable to coal leases, and to all oil and gas leases. To these was added, as an alternative to finding that the lease "cannot be successfully operated," a criterion permitting the Secretary to grant relief, "whenever * * * necessary * * * in order to promote development" consistent with the interests of conservation and encouraging the greatest ultimate recovery. This alternative gave the Secretary greater discretion in granting relief, although still requiring him to find that such relief would be "in the interest of conservation."

A 1948 amendment added oil shale, phosphate, sodium, potassium and sulphur leases to the coal and oil and gas leases covered in 1946.[16] The only subsequent amendment to this section simply stated that the Secretary's authority to waive, suspend or reduce royalties did not extend to advance royalties.[17]

III. Royalty Reduction Below Statutory Minimums

A. Statutory Language

The issue with respect to these statutes is whether Congress intended the royalty reduction authority in sec. 39 to be limited by the provisions establishing minimum production royalty rates. The language of sec. 39 itself does not indicate any such limitation. "The Secretary * * * is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on

[15] Although Congress initially approached the revision of sec. 39 as a consolidation of existing relief provisions, it actually went on to increase the scope of the Secretary's relief powers. *See United Mfg. Co.*, 65 I.D. 106, 118 n.4 (1958).

[16] Act of June 3, 1948, c. 379, § 7, 62 Stat. 291.

[17] Act of Aug. 4, 1976, P.L. 94–377, § 14, 90 Stat. 1091.

any tract or portion thereof segregated for royalty purposes." This language authorizes the reduction of rentals as well as royalties on mineral leases. Since the rentals for phosphate leases and sodium leases were fixed at a flat rate by statute [18] before the enactment of sec. 39, it is clear that sec. 39 must authorize rental reductions on those leases below the statutory rates. This conclusion about rental reductions under sec. 39 strongly implies that production royalties may similarly be reduced below the prescribed statutory minimum rates.

An examination of the history of sec. 39 supports this view. For example, the 1946 royalty reduction provisions of sec. 39 made no distinction between competitive and noncompetitive oil and gas leases. In fact, the section stated: "The provisions of this section shall apply to *all* oil and gas leases issued under this chapter." (Sec. 10 of Act of Aug. 8, 1946, 30 U.S.C. § 209 (1976); italics added.)

Yet the same 1946 amendments to the Act which revised and established sec. 39 also established the fixed 12½ percent royalty rate for noncompetitive oil and gas leases. This can only mean that Congress specifically contemplated the reduction of royalties on noncompetitive leases below the statutory 12½ percent. That such relief was also authorized with respect to competitive leases can scarcely be doubted.

B. Recent Congressional Interpretations

In enacting the Federal Coal Leasing Amendments Act of 1975, Congress echoed this view of sec. 39 with respect to coal royalties. Senator Lee Metcalf, floor manager of S. 391, in discussing the proposed 12½ percent minimum coal royalty rate stated:

> **Furthermore, section 39 of the Mineral Leasing Act, as amended, would continue to allow the Secretary to reduce the minimum royalty below 12.5 percent on a tract "for the purpose of encouraging the greatest ultimate recovery of coal." Thus an operator could pay a lesser royalty on that portion of the coal lease which might normally be uneconomical to mine given a 12.5-percent royalty, in the interests of conservation of the resource.**
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> * * * * *
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> **In other words, the flexibility built into the minimum royalty provisions in S. 391 allow [*sic*] the Secretary to encourage maximum recovery of coal while also generating a fair return to the public.[19]**

Similar language appeared in the June 24, 1976, letter from Senator Metcalf and Congresswoman Mink, the floor manager of the bill in the House, to President Ford urging him to sign the bill into law.[20] In vetoing the bill President Ford, who objected to the "high royalty rate" established by the bill, did not address the applicability of sec. 39 as a relief measure. In the debate

[18] Act of Feb. 25, 1920, c. 85, § 24, 41 Stat. 447, 30 U.S.C. § 262 (1976); Act of Feb. 7, 1927, c. 66, § 3, 44 Stat. 1057, 30 U.S.C. § 283 (1976).

[19] 122 Cong. Rec. 19376 (June 21, 1976).

[20] 122 Cong. Rec. 21357 (June 29, 1976).

over whether to override the veto Congresswoman Mink pointed out:

> The veto message * * * fails to mention that under section 39 of the Mineral Leasing Act, a section unchanged by S. 391, the Secretary will be authorized to "waive, suspend, or reduce" the minimum royalty for production from both surface and underground mines.[21]

And Congressman Roncalio, a member of the Committee that reported the bill, took pains to emphasize that:

> If 12.5 percent is too high for marginal or deep coal * * * the Secretary of the Interior can reduce that 12.5 percent to 7 percent, 5 percent, or 3 percent. He has always had the right to do that. Nothing in this bill takes that highly discretionary right away from the Secretary. He can cut the royalty down to whatever he wishes.[22]

Thus, it was the position of the two floor managers of the FCLAA, and of a committee member from a leading federal coal state, that sec. 39 of the Mineral Leasing Act authorized and would continue to authorize royalty reductions below statutory minimum rates at the discretion of the Secretary.[23]

C. Departmental Interpretations

Since the enactment of the amended sec. 39 in 1946, the Department has maintained that the Secretary has the authority to reduce royalties below the statutory minimums. Applications for such reductions have been received and a number of them have been granted. A comprehensive compilation [24] covering the period from July 1, 1957 through June 30, 1977, indicates that during that period 21 applications for royalty reductions on oil and gas leases were granted. Three of these reductions were to a flat rate below the 12½ percent statutory minimum. Two of these were granted in 1957 and the third in 1976. One is still in effect. The other 18 oil and gas royalty reductions were to a 1 percent per barrel per day per well rate, generally resulting in an effective royalty rate well under 12½ percent. Most of these were granted prior to 1965 and are still in effect.

During that same twenty-year period, royalty reductions were granted on other mineral leases as well. Some of these provided for rates below the minimums while others did not. The one sodium lease and 41 potash lease royalty reductions granted during that period did not reduce production royalties below the 2 percent statutory minimum for those minerals. However, all three phosphate lease royalty re-

[21] 122 Cong. Rec. 25456 (Aug. 4, 1976).
[22] 122 Cong. Rec. 25459 (Aug. 4, 1976).
[23] Congressman Ruppe, who took the opposing view, apparently based his opinion entirely on an interpretation he had received informally from individuals at the Department of the Interior. 122 Cong. Rec. 25461 (Aug. 4, 1976). This interpretation differed from the Department's position on this issue both before and since that time. *See* Part III.C., *infra*.

[24] Letter from Secretary Andrus to Congressman Runnels, Subcommittee on Mines and Mining (Feb. 27, 1978).

ductions granted during that time, two of which are still in effect, provided for an effective royalty rate below the 5 percent statutory minimum for phosphate leases.[25] Such reductions pursuant to sec. 39 were known even before the period covered by the 1978 compilation. In a May 31, 1974, memorandum to the Director, Office of Mineral Policy Development, the Assistant Solicitor for Minerals noted: "This is the interpretation of section 39 which has been followed by the Geological Survey and the rest of the Department through the years. This practice was known in 1953." [26]

The only deviation from this view appears to have occurred between 1976 [27] and 1979 and seems to have been proposed as a matter of policy. After the enactment of the Federal Coal Leasing Amendments Act of 1975, a revision of the coal leasing regulations was undertaken. While 43 CFR 3503.3-2(d) (1978), which had applied to coal as well as to other leasable minerals except oil and gas, had tracked the language of 30 U.S.C. § 209 (1976) by authorizing the Secretary to "reduce the royalty," the proposed coal regulation added the following reservation: "except that in no case shall a royalty be reduced below 12½ percent for surface mined coal, or 5 percent for underground coal." [28]

This language was drafted, in part, through a misunderstanding of the effect of the FCLAA increase in minimum production royalty rates on the Secretary's sec. 39 authority. Although the Department realized during the drafting process that sec. 39 remained applicable and would continue to support a discretionary reduction below the new minimum rates, the limiting language was allowed to stand in the proposed regulations as a policy decision not to exercise the Secretary's discretion to achieve reductions below those minimum rates. The preamble to the proposed regulations made this clear.[29] After receiving comments on the proposed regulations, the Department decided to return to its former approach to sec. 39, permitting royalty reductions below the statutory minimum rates. The final regulations were revised accordingly. The preamble to the final regulations stated:

> The final rulemaking reinstates the authority of the Secretary to reduce the royalty below the statutory minimum that must be fixed in each lease, in the exercise of his authority under section 39

[25] The compilation did not cover applications for reductions in coal royalties under sec. 39 during this period. Very few applications for reductions in coal royalty rates have been received in the past, owing to the low minimum rates in effect prior to passage of the FCLAA in 1976.

[26] Memorandum from Assistant Solicitor—Minerals to Director, Office of Mineral Policy Development (OMPD). "Reduction of Royalties on OCS Oil and Gas Leases" (May 31, 1974). This interpretation of sec. 39 was also discussed in a memorandum from the Assistant Solicitor—Minerals to OMPD dated May 20, 1974, "Reduction of Royalties on OCS Oil and Gas Leases and the Environmental Impact of Profit Sharing Provisions."

[27] *See* note 23, *supra*.

[28] Proposed 43 CFR 3473.3-2(d)(1), 44 FR 16844 (Mar. 19, 1979).

[29] 44 FR 16808 (Mar. 19, 1979).

of the Mineral Leasing Act (30 U.S.C. 209).[30]

The limiting language in the proposed regulation was deleted from 43 CFR 3473.3–2(d)(1) as it was finally adopted. The Department reaffirmed its longstanding interpretation that sec. 39 authorized reductions below the minimum coal royalty rates when necessary. 43 CFR 3503.3–2(d)(1) continues to provide for such royalty reductions for the other leasing act minerals, except oil and gas which are covered by similar language in 43 CFR 3103.3–7.

IV. Timing of Reduction of Royalty Rate Below Statutory Minimum

Having concluded that 30 U.S.C. § 209 (1976) permits the reduction of production royalties below the statutory minimum rates, we turn to the question of when such a reduction may be granted. The question arises in three different leasing situations: new competitive leases; the readjustment of existing leases; and the issuance of preference right leases.

A. New Leases

The terms of any new competitive lease must recognize the statutory minimum rates. The rate established in the initial lease can be no lower than the established minimum. This follows from the mandatory language used by Congress in each of the royalty statutes:

> A coal lease * * * shall require payment of a royalty * * * of not less than 12½ per centum. [31]
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> * * * * *
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> [O]il or gas * * * shall be leased * * * [at] such royalty as may be fixed in the lease, which shall be not less than 12½ per centum. [32]
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> * * * * *
>
> * * * All [phosphate] leases shall be conditioned upon * * * payment * * * of such royalties as may be specified in the lease, * * * at not less than 5 per centum. [33]

Such initial adherence to the statutory minimums is the only way in which such minimums can be effectively applied. The reason the initial lease must prescribe a royalty rate at or above the statutory minimum is in order to make that minimum an effective constraint on the leasing powers of the Secretary as Congress intended. The Secretary can alienate interests in land belonging to the United States only in conformity with the conditions prescribed by Congress. *Union Oil Co. of California* v. *Morton*, 512 F.2d 743, 748 (9th Cir. 1975). Those conditions include the statutory minimum production royalty rates. The Congressional purpose was twofold: first, to insure that the public received a fair return on any initial lease; and sec-

[30] 44 FR 42606 (July 19, 1979).

[31] 30 U.S.C. § 207(a) (1976).

[32] 30 U.S.C. § 226(b) (1976).

[33] 30 U.S.C. § 212 (1976). Similar mandatory language is used with respect to the other Leasing Act Minerals.

ond, to insure that mineral leases which could not be operated economically from the outset under minimum conditions would not be issued. This point was made during the debate in Congress at the time the statutory minimum production royalty rate was raised. 122 Cong. Rec. H–158 (daily ed., January 21, 1976). The effect, then, is to encourage the leasing and development of productive mineral lands, while discouraging the uneconomic development of more marginal lands. An initial reduction as an incentive to production is not authorized. *Montana Power Co.*, 72 I.D. 518, 519 (1965).

In order to carry out these Congressional policies reflected in the minimum production royalty statutes, each lease must conform to the statutory requirements at the outset. Only when difficulties in the conservation and recovery of the leased mineral later occur may a reduction below the minimum rate be justified. This procedure is required by the relief provision itself, and is made particularly clear in light of the original relief provision in the 1920 Mineral Leasing Act. That provision, then sec. 17, authorized the Secretary, when necessary, to "reduce * * * the royalty *fixed in the lease*." (Italic added). This approach, although not this language, is continued under the current Act, which provides for the reduction of royalty "on * * * [the] leasehold." Sec. 39 relief is available only *after* a lease has already been issued in compliance with the statutory royalty requirements.

The policy reason for insisting upon this distinction between the initial royalty terms of a lease and their subsequent reduction was discussed by the Interior Board of Land Appeals in *Kerr-McGee Corp.*, 12 IBLA 348 (1973). In that appeal, a coal mining company seeking a preference right lease petitioned the Department for a reduced royalty rate at issuance of the lease based on difficult mining conditions encountered during the development stage. The Department sought to impose its standard royalty rate for the region, $.20/ton. In rejecting the company's petition the Board pointed out: "[A]ny royalty rate now established commits the Government resources for the next 20-year period." [34]

The Board held that only after issuance of the lease, commencement of production, and a showing of actual necessity under sec. 39 criteria, would a reduction be available. This policy approach protects the interests of the public in receiving a fair return over the life of the lease. In contrast, if a reduction were incorporated in the initial terms of the lease, the Government would be unable later to raise the royalty rates if the circumstances on which the reduction was based were to cease. The holding in *Kerr-McGee* recognized the role of sec. 39 as essentially a relief provision, to be applied to modify the fixed lease terms when, and only so long, as

[34] 12 IBLA at 351 (1973).

necessary.[35] Consequently a reduced royalty rate below the statutory minimum will not be granted as an incentive to operations on a new lease but must be applied for after the lease terms have been fixed. *Duncan Miller*, A–30711 (Nov. 16, 1966). Based on the statutory language and the purposes of the royalty and relief provisions, I conclude that a reduction in production royalty rates below the statutory minimum may not occur at the issuance of a lease.

B. Lease Readjustment

Most competitive and noncompetitive mineral leases, other than oil and gas, are issued for a primary term of years after which their provisions may be readjusted periodically.[36] The question of the timing of royalty reductions here arises in connection with the Secretary's power to "readjust" the provisions of leases upon the expiration of each lease readjustment period.

With respect to coal leases, 30 U.S.C. § 207(a) (1976) read in pertinent part: "[R]oyalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

A similar "readjustment" is authorized for leases of phosphate, sodium, potassium and oil shale.[37] At the time of readjustment, the Secretary may reduce or raise royalty rates as he determines is appropriate. Reduction of royalty rates at this time, however, cannot be to a rate below the prescribed statutory minimum. The reason for this is that discussed in *Kerr-McGee*, the protection of the Government's royalty interest through the period of the lease. Since the readjusted terms of the lease govern for the length of the ensuing extension period until the next readjustment date, they must be set in accordance with the statute. Moreover, the Secretary must apply the law that is currently in effect in setting the readjusted terms of any lease; he has no authority to readjust a lease contrary to Congress direction regarding lease terms.

[35] It should be noted that in *Kerr-McGee*, the Department had proposed royalty rates well above the statutory minimum of $.05/ton, and the company was seeking a reduction not below the minimum rate. If a reduction in the initial lease terms was not appropriate under these circumstances, *a fortiori* it would not be appropriate where the lessee sought an initial royalty rate *below* the statutory minimum rate.

[36] Coal leases issued under sec. 7 of the Act, 30 U.S.C. § 207 (1970), prior to the FCLAA were not issued for a "primary period," but for an indeterminate period subject to diligent development and continued operation requirements. These leases were issued subject to readjustment at 20-year intervals. The readjustment of these leases is intended to be included in this discussion even though there is no actual renewal of the lease itself associated with the readjustment.

[37] 30 U.S.C. §§ 212, 262, 283 and 241 (1976), respectively. While the word "readjustment" is not specifically used in connection with sodium leases, it is clear that this is what is meant by "renew for successive periods of ten years *upon such reasonable terms and conditions as may be prescribed by the Secretary*," 30 U.S.C. § 262 (italics added). *See* 43 CFR § 3522.1–1. No "readjustment" provision exists for oil and gas leases.

It was in part for this reason that the Secretary promulgated 43 CFR 3451.1(a)(2) to require, as they came due, the readjustment of all existing coal leases with royalty rates below the new minimums to conform to the new FCLAA 12½ percent minimum rates. The Deputy Solicitor concluded last year that the minimum production royalty provisions required the Secretary to "place on readjusted leases a royalty of not less than 12½ per centum of the value of [surface mined] coal," and that the sec. 39 relief provisions could only be "subsequently" exercised to grant a reduction below this minimum.[38] The rationale supporting this approach to the readjustmen of coal leases is equally valid for the other leasable minerals subject to readjustment.

Thus, while the Secretary is given some leeway in his readjustment of lease terms under the extension provisions, he must conform his readjustment to the requirement of the then current statutory minimum production royalty rates. Any reduction below such rates must take place pursuant to sec. 39, and independent of the establishment of the readjusted lease terms. The readjustment process and the sec. 39 relief process may not be merged into a single process where this would result in a readjusted rate below the relevant statutory minimum production royalty rate.

[38] Memorandum from Deputy Solicitor to Deputy Under Secretary, "Royalty Terms Upon Readjustment of Coal Leases" (May 2, 1978).

C. Preference Right Leases

Certain mineral leases are still granted on a preference right basis. Like new leases and readjusted leases, preference right leases must adhere to the statutory minimum rates in their initial terms. Two reasons exist for treating preference right leases in this way. The first is the *Kerr-McGee* rationale discussed above, to protect the Government's royalty interest over the course of the ensuing lease period.[39] The second is the requirement for issuance of a preference right lease, that the lease applicant have discovered "commercial quantities," [40] or "valuable deposits" [41] of the mineral. No preference right lease may be issued until the applicant has shown that his discovery meets the applicable legal standard. Upon the Secretary's determination that such a showing has been made, the applicant is entitled to the lease as a matter of right. *NRDC* v. *Berklund*, 458 F. Supp. 925, 928 (D.D.C. 1978), *aff'd*, —— F.2d —— (No. 78–1757, D.C. Cir., Nov. 9, 1979). In making this determination, the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease. The Secretary is not limited to considering only those conditions which, at the time of the issuance of the prospecting permit, had been considered in the determination of whether a permittee was

[39] *Kerr-McGee* in fact involved a preference right lease.

[40] 30 U.S.C. § 201(b) (1970) (coal).

[41] 30 U.S.C. § 211(b) (phosphate); 30 U.S.C. § 262 (sodium); 30 U.S.C. § 272 (sulphur); 30 U.S.C. § 282 (potassium).

entitled to a noncompetitive lease. *Montana Eastern Pipe Line Co.*, 55 I.D. 189, 191 (1935). Neither is his consideration limited to legal and economic requirements as of the date of the lease application. Rather, the Secretary's determination is based upon the law and economic situation as of the date of adjudication of the application. *NRDC* v. *Berklund, supra; Utah International, Inc.* v. *Andrus*, C 77-0225 (D. Utah, June 15, 1979). Thus, the Secretary must apply the current minimum production royalty statutes as part of his evaluation of the applicant's showing of "commercial quantities" or "valuable deposits." A proposed lease operation that is unable to meet the minimum production royalty rates from the outset would not qualify for a preference right lease under either of these standards. A lease will not be granted where it cannot be operated except with royalty relief. The minimum royalty rates must appear in the initial terms of any properly granted preference right lease.

Thus, any royalty reduction under sec. 39 of the Mineral Leasing Act below the prescribed minimum rates must occur at times other than the setting of the initial or readjusted terms of the mineral lease. This is true whether the initial lease is issued competitively or to a preference right applicant.

V. Conclusion

The royalty reduction provisions of sec. 39 of the Mineral Leasing Act, *as amended* (30 U.S.C. § 209 (1976)), authorize the Secretary to reduce production royalties on mineral leases below the statutory minimum rates set out in other sections of the Act. Thus, reductions below the statutory minimums may be made at the Secretary's discretion in conformance with the requirements of sec. 39. In no case, however, may such reductions be prescribed as a part of the initial or readjusted terms of any lease. The relief afforded by sec. 39 is meant to occur apart from the establishment of the basic lease terms for any given lease period.

FREDERICK N. FERGUSON
DEPUTY SOLICITOR

APPEAL OF THEODORE J. ALMASY ET AL.*

4 ANCAB 151

Decided *February 27, 1980*

Appeal from the Decision of the Bureau of Land Management AA-8103-2, 44 FR 25939 (May 3, 1979).

Affirmed in part.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Valid existing rights which are protected under § 14(g) of the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) are in all cases derived from and created by the State or Federal Government.

*Not in chronological order.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Sec. 22(b) of ANCSA protects rights of use and occupancy pending patent of land upon which lawful entry was made prior to Aug. 31, 1971, for the purpose of gaining title to a homestead, headquarters site, trade and manufacturing site, or small tract site. Protection under § 22(b) is contingent upon compliance with the appropriate public land law.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Sec. 22(c) of ANCSA provides limited protection for unpatented mining claims, contingent upon compliance with the specified requirements.

4. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

Sec. 14(c) of ANCSA protects certain land uses based on occupancy alone, by requiring that village corporations receiving lands pursuant to ANCSA reconvey to the occupants those lands occupied for certain specified purposes.

5. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the appellants have not asserted that they have a lease, contract, permit, right-of-way, or easement issued by the Federal Government or by the State of Alaska, they fail to prove entitlement to the protection provided by § 14(g) of ANCSA.

6. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the appellants do not allege entry under, or compliance with, any public land laws, they cannot claim the protection of § 22(b).

7. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

Where the appellants' claimed right to use and occupancy of certain land is based on past use and occupancy of the land, such right might be protected by the reconveyance provisions of § 14(c) if the proposed conveyance were to a village corporation.

8. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

The Board lacks jurisdiction to decide an appeal based on interests claimed pursuant to § 14(c) There is no administrative appeal process available to claimants under § 14(c), and the only recourse is to a judicial forum.

9. Color or Claim of Title: Adverse Possession

Prescriptive rights cannot be obtained against the Federal Government. Except as provided by the Color of Title Act, 45 Stat. 1069, *as amended*, 43 U.S.C. § 1068–1068b (1976), no adverse possession of Government property can affect the title of the United States.

10. Color or Claim of Title: Adverse Possession

The Color of Title Act requires that the claimant have held the subject tract of public land in good faith and in peaceful, adverse possession under claim or color of title for more than 20 years.

11. Color or Claim of Title: Adverse Possession

Under the Color of Title Act, color or claim of title must be based upon a document from a source other than the United States which purports to convey to the applicant the land for which application is made. Possession and improvement of public land by a color of title applicant in the mistaken belief that he owns it is not sufficient basis for conveying title under the Color of Title Act.

12. Color or Claim of Title: Good Faith

Good faith under the Color of Title Act requires that the claimant possess the land without knowing or having reason to know that title to the land was vested in the United States.

13. Color or Claim of Title: Adverse Possession

Where appellants have not alleged facts bringing their claims within the Color of Title Act, they are not entitled to land under that statute.

14. Color or Claim of Title: Adverse Possession

Exclusive possession is required for the possession to be adverse.

15. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

As an administrative adjudicative body organized to decide appeals under ANCSA, the Board finds all challenges to the validity of ANCSA beyond its jurisdiction.

APPEARANCES: Theodore J. Almasy, pro se on behalf of Margaret L. Mespelt; Robert C. Babson, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Elizabeth S. Taylor, Esq., on behalf of Doyon, Limited.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

The Bureau of Land Management (hereinafter BLM), on Apr. 30, 1979, issued the above-referenced decision to issue conveyance of lands to Doyon, Limited (hereinafter Doyon). Theodore J. Almasy, on behalf of himself and Margaret L. Mespelt, entered this appeal claiming all the lands within T. 26 S., R. 22 E., Kateel River meridian, Alaska (unsurveyed) on the basis of use and occupancy (sole occupancy since 1963) and certain unspecified unpatented mining claims. The first question is whether use and occupancy prior to Dec. 18, 1971, other than pursuant to specific statutory authorization, gives rise to any valid existing right in the land on the part of a third party as against a grantee Native corporation. The Board holds that it does not.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977) (hereinafter ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions, and decision.

PROCEDURAL BACKGROUND

On Apr. 30, 1979, the BLM issued its above-referenced decision to convey, *inter alia*, all of T. 26 S., R. 22 E., Kateel River meridian, Alaska (unsurveyed) to Doyon, Limited.

On June 8, 1979, the appellants filed with the Board a letter protesting and appealing the decision of the BLM insofar as it failed to exclude T. 26 S., R. 22 E., Kateel River meridan, from the proposed conveyance. Appellants claimed such township in its entirety under "Aboriginal Title" and pursuant to "Use and Occupancy." Moreover, appellants alleged occupation of the specified township for a period "far in excess of the ten (10) year Statute of Limitations on Adverse Claims against the United States and the so-called State of Alaska, and have been the sole occupants since March 1963."

Appellants also asserted the illegality and unconstitutionality, on grounds, of ANCSA.

The Board, by Order dated June 22, 1979, stated it considered appellants' letter to be a Notice of Appeal and Statement of Reasons and Interest Affected, and ordered the filing of any answers within 30 days of the date of the Order.

The BLM then filed its "Response to Appellants' Statement of Reasons and Motion to Dismiss." The BLM interpreted appellants' appeal only as an attack upon the constitutionality of ANCSA rather than as alleging violations by the BLM of the substantive provisions of ANCSA or of any other statute of the United States. Accordingly, the BLM argued the appeal to be beyond the subject matter of the Board, and moved for dismissal.

Doyon then filed its "Response to Appellants' Statement of Reasons and BLM's Motion to Dismiss." Taking issue with BLM's interpretation of the appeal, Doyon on page 3 declared "the basic thrust of Appellants' appeal is that they have acquired property rights in the township in question which prevents its conveyance to Doyon." Continuing, Doyon stated:

> **Whether Appellants' claims are valid existing rights, and whether the DIC's in question adequately recognize these rights or whether the DIC's attempt to convey to Doyon lands or interests in lands which are owned by Appellants are questions which are certainly within the Board's jurisdiction, and which must be determined prior to interim conveyance to Doyon.**

Response, page 3.

Insofar as appellants had asserted ownership of unpatented mining claims, Doyon incorporated by reference Section V of its Memorandum in Support of Statement of Reasons filed in *Appeal of Doyon, Limited*, ANCAB VLS 79–15. Said section argued that BLM should identify and adjudicate unpatented mining claims on the subject property.

Appellant, Theodore J. Almasy, subsequently submitted a letter, the express intent of which was to amend, supplement, and/or clarify information previously presented. The letter reiterated appellants' claim to the subject land on the basis of "use and occupancy," and further declared such to be the "legal basis under which unpatented mining claims are held and maintained under the 'Rules' of the U.S. Mining Law of 1872."

DECISION

The issue central to this appeal is whether the appellants have asserted any interest, in lands affected by the decision appealed, which is protected under ANCSA. The question is whether use and occupancy prior to Dec. 18, 1971, other than pursuant to specific statutory authorization, gives rise to any valid existing right in the land on the part of a third party as against a grantee Native corporation.

[1] Sec. 14(g) of ANCSA renders all conveyances made pursuant to ANCSA subject to valid existing rights. Valid existing rights protected under § 14(g) are, in all cases, derived from and created by the State or Federal Government. *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349, 369–370 (1977) [VLS 75–14/15]. Accordingly, the illustrative list of valid existing rights in § 14(g) of ANCSA is of rights "issued" by the State of Alaska or the United States.

[2] Sec. 22(b) protects rights of use and occupancy pending patent of land upon which lawful entry was made prior to Aug. 31, 1971, for the specified purposes of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites. Protection under § 22(b) is contingent upon compliance with the appropriate public land law.

[3] ANCSA also addresses the rights of mining claimants. Sec. 22 (c), which provides limited protection for unpatented mining claims, requires that any claim or location for which protection is sought have been initiated under the general mining laws prior to Aug. 31, 1971, that it be valid, and that notice of the claim or location be recorded with the appropriate State or local office. Lack of compliance with the foregoing requirements renders § 22 (c) inapplicable to the subject claim or location, and leaves the claimant or locator without protection under ANCSA.

[4] Finally, § 14(c) of ANCSA protects certain land uses based on occupancy alone, without requiring a claim of title or of a lesser interest derived from contract entry under the public land laws, or other authorization. Sec. 14(c) requires that village corporations receiving lands pursuant to ANCSA reconvey to the occupants those lands occupied as a primary place of residence or business, as a subsistence campsite, or as headquarters for reindeer husbandry. Village corporations are also required to reconvey to the occupants lands occupied by nonprofit corporations.

[5] The appellants have not asserted that they have a lease, contract, permit, right-of-way, or easement issued by the Federal Government or by the State of Alaska, and thus have failed to prove entitlement to the protection for such valid existing rights provided by § 14(g).

[6] Similarly, the appellants do not allege entry under, or compli-

317-795 O - 80 - 2

ance with, any public land laws. The interests they claim are thus not within the protection offered by § 22(b).

[7] The appellants' claimed right to use and occupancy of certain land might be protected, at least as to tracts of a limited size, by the reconveyance provisions of § 14(c) if the proposed conveyance were to a village corporation. The decision here appealed, however, approves conveyance to a regional corporation of lands selected pursuant to § 12(c) of ANCSA. While the Board cannot foresee any circumstance in which claims based on § 14(c) of ANCSA could be asserted against a regional corporation, the Board does not rule on the point at this time.

[8] In any case, the Board lacks jurisdiction to decide an appeal based on interests claimed pursuant to § 14(c). Appeals involving § 14(c) interests are premature when brought prior to conveyance of the land to the appropriate Native corporation, because until the corporation has received conveyance and has in some manner refused reconveyance to a claimant, no dispute exists to be adjudicated. Following conveyance to the Native corporation, when such a dispute may arise, the Department, including this Board, has no jurisdiction over issues involving patented land. Thus, there is no administrative appeal process available to claimants under § 14(c), and the only recourse is to a judicial forum. *Appeal of James W. Lee*, 3 ANCAB 334, 343 (1979) [VLS 79–11]. Accordingly, this Board does not rule on any rights to reconveyance which the appellants might have under § 14(c), and this decision in no way prejudices such rights.

[9] Appellants claim rights in the subject lands pursuant to exclusive and adverse use and occupancy for a period "far in excess of the ten (10) year statute of limitations on adverse claims against the United States and the so-called State of Alaska * * *." It is a well established doctrine that prescriptive rights cannot be obtained against the Federal Government. *Appeal of Sam E. McDowell, et al.*, 2 ANCAB 350, 355 (1978) [VLS 78–2]; *Manley Rustin and Betty Rustin*, 28 IBLA 205, 208 (1976). Generally, one may not acquire title to Government land, or to any part of the public domain, by adverse possession. Except as provided by the Color of Title Act, 45 Stat. 1069, *as amended*, 43 U.S.C. § 1068–1968b (1970), no adverse possession of any governmental property can affect the title of the United States. 2 C.J.S. *Adverse Possession* §§ 10, 13, 14.

[10, 11, 12] The Color of Title Act (hereinafter Act), at 43 U.S.C. § 1068, requires that the claimant have held the subject tract of public land in good faith and in peaceful, adverse possession under claim or color of title for more than 20 years. Under the Act, color or claim of title must be based upon a document from a source other than the United States, which document on

its face purports to convey to the applicant the land for which application is made. *Marie Lombardo*, 37 IBLA 247, 248 (1978); *Manley Rustin and Betty Rustin, supra.* The possession and improvement of public land by a color of title applicant in the mistaken belief that he owns it is not a sufficient basis for conveying land under the Color of Title Act. *Frank W. Sharp*, 35 IBLA 257, 260 (1978). Furthermore, good faith under the Act requires that the claimant possess the land without knowing or having reason to know that title to the land was vested in theUnited States. *Joe Stewart*, 33 IBLA 225, 229 (1977). Good faith requires an honest belief by claimant that the land was owned by him, and the Department may consider whether such belief was unreasonable in the light of the facts then actually known to him. *Lawrence E. Willmorth*, 32 IBLA 378, 381 (1977).

[13, 14] The appellants have not alleged facts bringing them and their claims within the purview of the Color of Title Act. Thus, they are not entitled to receive title to land under that statute. While they deny United States ownership of the land, appellants have been aware from the time of their entry of the government's claim of ownership. Appellants' claim of ownership is based on a mistake of law rather than on a chain of title found defective. Furthermore, claimants claim exclusive possession for less than 20 years. Exclusive possession is required for the possession to be adverse. *Lawrence E. Willmorth, supra* at 382. Thus, appellants have not possessed the land adversely for the requisite period. It might also be noted that the Act authorizes issuance of patent to no more than 160 acres to each qualified claimant. Such acreage is a minute fraction of that claimed by the appellants here.

The appellants assert that ANCSA is unconstitutional.

[15] As an administrative adjudicative body organized to decide appeals under ANCSA, the Board must rule that all challenges to the validity of ANCSA are beyond its jurisdiction. *Appeal of Clifford C. Burglin*, 3 ANCAB 37, 46 (1978) [OG 77-4].

In claiming rights pursuant to "use and occupancy," appellants do not allege compliance with the law and regulations relating to unpatented mining claims. Nonetheless, appellants do allege ownership of numerous unpatented mining claims within the subject township. While rejecting appellants' arguments regarding rights based on use and occupancy, the Board recognizes the possibility that appellants possess valid unpatented mining claims for which protection is accorded by ANCSA.

ORDER

The Board hereby rejects appellants' arguments regarding claims based on mere use and occupancy of the subject lands, on prescriptive rights against the United States, and on the alleged invalidity of ANCSA.

The Board reserves for future consideration the issues raised by the allegation of appellants' ownership of unpatented mining claims. Appellants are hereby Ordered to file with the Board, and to serve upon the other parties to this appeal, within thirty (30) days of the date of this Order, a listing of all unpatented mining claims located in T. 26 S., R. 22 E., Kateel River meridian, Alaska, and claimed by the appellants. Each claim is to be identified by the reference number under which it is filed pursuant to the Federal Land Policy and Management Act of 1976.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF WASHINGTON UNIVERSITY

IBCA-1228-11-78

Decided *March 4, 1980*

Contract No. 68-01-2471, Environmental Protection Agency.

Denied.

Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Contract Clauses

Where a contractor is found to have failed to maintain a system of cost records as required in the cost reimbursable contract, an affidavit of the contractor's project director prepared 5 years later is found to be insufficient evidence that unsupported retroactive cost transfers to the contract were costs actually incurred in performance of the contract.

APPEARANCES: Mr. Peter H. Ruger, General Counsel, Washington University, St. Louis, Missouri, for appellant; Mr. Keith L. Baker, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is from the disallowance of $8,247 in costs associated with salary and wage transfers under a cost reimbursement contract. The appeal is submitted on the record.

Background

Appellant is a private university engaged in numerous research projects under its own sponsorship as well as Federal grants and contracts. The instant contract for $124,930, awarded on June 20, 1974, called for one year of effort to produce a research report on testing the reliability with which the bacterial Mutagenic Technique can distinguish between carcinogenic and noncarcinogenic synthetic organic chemicals. The contract was performed and the report delivered.

The Contracting Officer disallowed the amount in dispute because the salary costs and associated burdens and fringes were incurred in July and August of 1974 and charged to other contracts and a grant and were transferred to the instant contract in Dec. 1974 without sufficient documentation. An audit report dated Nov. 14, 1977 (AF–12),[1] contained recommendations for adjustment, including the costs disallowed. The report refers to a prior audit for the 4-year period ending June 30, 1975 (AF–13), which included the period of performance of the subject contract. The latter audit report found certain deficiencies in appellant's accounting system including the charging of salaries to projects on the basis of budget estimates rather than on the basis of the actual effort expended and a common practice of payroll transfers without sufficient review and justification.

The 4-year audit report found that during fiscal year 1975, when the instant contract was performed, there were 102 questionable transfers totalling $358,611, with about 68 percent of the adjustments transferring costs out of departmental accounts into Federal grants or contracts. The audit stated an opinion that a significant number of the transfers were made for the convenience of the various departments. A basic criticism of appellant's accounting system was the failure to comply with Federal Management Circular (FMC) 73–8.

Appellant argues that the costs should be allowed because:

1. The contract contained no express provision concerning applicable cost accounting standards for educational institutions.

2. The contract was fully and satisfactorily performed and the Government has not presented any evidence to indicate that the persons named in the salary transfers did not actually perform work on the contract.

3. The salary transfers were not made near the end of the contract performance period as had been others transfers complained of by the auditors.

4. There is ample after-the-fact justification to show that the compensation sought is reasonable and necessary for performance of the contract and the basic purpose of audits to permit contractors to correct deficiencies in the future has been ignored by the Government.

5. By affidavit dated May 1, 1979, appellant's project director affirmed that to the best of his recollection he had, in conformance with the then prevailing practice, verbally requested office personnel in June 1974 to effect the salary transfers to reflect actual changes in effort on the contract, and then again requested the transfer be made in Dec. 1974 upon learning his verbal instructions had not been carried out.

The Government contends that (1) the claimed costs are not allow-

[1] All references are to appeal file documents.

able pursuant to Clause 18 of the contract which incorporates Subpart 1–15.3 of the Federal Procurement Regulations as applicable cost accounting standards which were not met, (2) the contractor has not presented evidence sufficient to sustain the burden of proving the costs were actually incurred in performance of the contract, and (3) that $802.75 of the claimed costs could not be allowed because this amount is related to the salary of a key person transferred without the required prior approval of the Government.

Clause 18, "Allowable Cost and Payment" (AF–14), contains the following pertinent provisions:

(a) For the performance of this contract, the Government shall pay to the Contractor the cost thereof [hereinafter referred to as "allowable cost"] determined by the Contracting Officer to be allowable in accordance with:

(1) Subpart 1–15.3 of the Federal Procurement Regulations as in effect on the date of this contract * * *; and

(2) The terms of this contract.

Clause 23, "Audit and Records" provides:

(a) The Contractor shall maintain books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. The foregoing constitute "records" for the purposes of this clause.

Article XIII, "Identification of Key Personnel and Notification of Change" provides:

It is recognized by the parties that in order to maintain a successful program, the Contractor must assign highly capable and qualified personnel. Therefore, the Contractor agrees to notify the Contracting Officer of changes in the Contractor's assignments of key personnel listed below. Such notification shall be given within a reasonable time prior to its implementation and shall require approval by the Contracting Officer.

Prof. Barry Commoner

Discussion and Findings

First it is appropriate to address appellant's contention that the contract contained no express provision concerning applicable cost accounting standards. Appellant correctly states that the notation, "Not applicable to educational institutions" is typed beside paragraph 15 of the Special Instruction to offerors. This paragraph relates to cost accounting practices under contracts subject to the requirements of the Cost Accounting Standards Board. In subparagraph d, contracts with educational institutions subject to FPR 1–15.3 (41 CFR 1–15.3) are excepted from such requirements. However, the above quoted portion of Clause 18 of the contract clearly provides for allowable costs to be determined by the Contracting Officer in accordance with FPR 1–15.3. Regarding payroll systems of educational institutions, FPR 1–15.309–7(d) states that:

[I]nstitutional payroll systems must be supported by either (1) an adequate appointment and workload distribution system accompanied by monthly reviews performed by responsible officials and a reporting of any significant changes in workload distribution of each professor

or professional staff member, or (2) a monthly after-the-fact certification system which will require the individual investigators, deans, departmental chairmen, or supervisors having firsthand knowledge of the services performed on each research agreement to report the distribution of effort.

Therefore, we find that the contract did contain express provisions concerning applicable cost standards.

The second contention of appellant is that the contract was fully and satisfactorily completed and the Government offered no evidence that the persons involved in the salary transfers did not work on the contract. The satisfactory completion of a cost reimbursable contract is not a determining factor for allowance of costs, unless it can be shown that the costs were actually incurred by the contractor and are otherwise allowable. Had fortuitous circumstances permitted the contract to be fully performed with the expenditure of only 50 percent of the estimated cost, the contractor has no claim for any cost above those actually incurred. Conversely, a cost reimbursable contractor has no obligation to complete the contract work when the estimated costs have been exceeded. Therefore, the satisfactory completion of the contract work is not relevant to the issue of entitlement to the total estimated costs. The second part of appellant's argument seeks a reversal of roles between the contractor and the Government. It is the contractor's responsibility to maintain records in compliance with the contract requirements which show that the persons involved in the salary transfers did actually work on the contract. Except for the affidavit of Dr. Commoner, which will be discussed below, the Government's examination of appellant's records could not verify whether the persons involved worked on the contract. The contract agreement is for the contractor to keep adequate cost records to show incurred costs. The Government does not agree to keep records of the contractor's expenditures, so that proof that the persons did not work on the contract would not normally exist. What is important is that the contractor's burden of keeping the records of actual costs incurred carries with it the burden of proving by adequate records that the involved persons' salaries were a part of the actual cost. Appellant's third contention is that the salary transfers did not occur near the end of the contract performance period. Again, appellant does not perceive its obligations correctly. The transfer of cost to a contract close to the end of the contract performance may cause concern and closer scrutiny of the transfer by the auditors. However, the disallowance of salary transfers is based on insufficient documentation, and not on the time the transfers occurred. In this appeal, we are concerned only with the question of whether the contractor's records are sufficient to show that the disputed costs were incurred in performance of the contract.

Appellant has not offered the evidence necessary to support the

fourth argument respecting the reasonableness and necessity of the compensation sought in performances of the contract (the total estimated cost) and the purpose of audits. Regarding the amount of compensation sought, our discussion above should suffice to show that reasonableness of the compensation sought by appellant is not determinative. The necessity of expenditures must be measured against the adequacy of appellant's records showing the actual costs and the allowability of the costs under the contract standards. Absent any proof offered in support of the reasonableness and allowability of the disallowed salary transfers, we must reject this argument. The argument that audits have the basic purpose of permitting future improvements to correct present deficiencies must fail for want of proof. We must and do take notice of the many audits performed for the express purpose of determining the actual costs expended in performance of a contract or the actual costs expended in the performance of a change in the contract work. Appellant's position suggests that an audit of a cost reimbursable contractor will not be used to penalize for failure to keep adequate records. The fallacy of this position is demonstrated in the myriad of cases to the contrary.

The last argument of appellant is that the salary transfers were not timely accomplished because of a breakdown in the then existing system of verbal orders for the transfers. The affidavit of Dr. Commoner (Exh. A) dated May 1, 1979, is offered to show that the error was corrected upon discovery some 5 to 6 months later. There was considerable delay in settling the record in this case while appellant's counsel secured this affidavit from the very busy and unavailable Dr. Commoner. A dispute arose between the parties over the weight to be given the affidavit as compared with testimony given on deposition. The Board denied additional time for appellant to secure the deposition of Dr. Commoner, and in this instance, accords the same weight to the affidavit.

According to his affidavit, Dr. Commoner, director of the contract effort, verbally ordered the transfer of four persons to the contract work in June of 1974. This action was taken because one of the principal investigators would be absent on vacation. The order was not carried out and upon a review of the contract cost records in December, Dr. Commoner again directed the transfers be made. On this occasion, the records were changed to show the transfers. The affidavit is the specific evidence relied on by appellant in support of the claim for the disallowed costs. Appellant has not offered affidavits of any of the persons involved in the salary transfers attesting to their work on the contract. Neither has appellant alleged that any or all of the persons involved are no longer employed at the university or are unavailable. Such affidavits would be more credible than that of a busy director recalling individual transfers on a single contract occurring 5 years

earlier. The involved individuals would be more likely to recall their work experience or to have noted it on their resumes of experience. Dr. Commoner's affidavit is based entirely on his recollection of events 5 years past and no reference is made to any notes or memoranda in aid of his memory.

The basic issue presented by the Government's disallowance of the salary transfers is whether there is sufficient evidence that the costs were incurred in performance of the contract. Other than the disputed costs, the auditors found that no opinion could be expressed respecting allowability of an additional $76,346 in claimed costs because of weaknesses in the appellant's payroll certification system. The contract required (FPR 1–15.309–7 (d)) timely monthly reviews or certifications by responsible knowledgeable officials of the workload distribution. The auditors interviewed several of the responsible departmental officials and found that many were unaware of the significance of the certification process. The audit revealed many instances of certifying the monthly reports of workload distribution on the basis of initial budgeted amounts. They found the certifications were untimely made months after the reporting period and frequent after-the-fact transfers of salary charges without regard to the initial certifications. The transfers were freely made by the accounting office upon request by a department without supporting justification.

Appellant's reply to the audit does not contest the existence of the practices found by the auditors. Instead, it attempts to justify the accounting practices by reference to the guidelines in the DHEW Grants Administration Manual, previous favorable audit reports by other agencies, and the absence of guidelines in any grants instruction dealing with salary transfers.

Appellant mistakenly relies on the less stringent accounting requirements that may apply to grants and was apparently unaware that different requirements were expressed in its contracts. It failed to distinguish between contracts, grants, and university sponsored projects and freely permitted retroactive unexplained adjustments of charged salary costs between projects. As a result, appellant's practices denies knowledge of actual costs of any project to itself as well as the Government.

We find that appellant failed to maintain the contract cost records as required by the contract. The cost records that were maintained do not show that the disputed costs were actually incurred in performance of the contract. The absence of a contemporaneous justification of the tardy salary transfers cannot be overcome solely by an affidavit 5 years later by the project director relying totally on his recollection. There is no evidence in the record other than the affidavit to show that the transferred salary costs were incurred in performance of the contract.

We find that the appellant has failed to prove his claim and the appeal is denied.[2]

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEALS OF GREGORY LUMBER CO.

IBCA-1237-12-78,
1238-12-78
1239-12-78
1240-12-78

Decided *March 11, 1980*

Contract Nos. OR090-TS7-8 (Poddle Creek), 36090-TS5-49 (Fish Creek), OR090-TS6-18 (Salmon Creek), OR090-TS6-60 (Rat Creek), Bureau of Land Management.

Motion to dismiss granted.

1. Contracts: Construction and Operation: Intent of Parties—Contracts: Contract Disputes Act of 1978: Jurisdiction

Where the contracting officer responds to appellants general inquiry on a number of pending claims, the Board finds that response is not a new appealable decision occurring after the effective date of the Contract Disputes Act of 1978 with regard to four appeals previously dismissed for lack of jurisdiction and then pending before the Board on appellant's motion for reconsideration.

APPEARANCES: Mr. Edward F. Canfield, Attorney at Law, Casey, Scott & Canfield, Washington, D.C., for appellant; Messrs. Lawrence E. Cox and Donald P. Lawton, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Motion to Dismiss

The Government has filed a motion to dismiss the above-captioned appeals on the grounds that there is no appealable contracting officer decision within the jurisdiction of this Board.

Background

The above-captioned appeals were dismissed by the Board in an opinion dated Sept. 28, 1979, because the Board lacked jurisdiction. None of the four contracts involved contained a disputes clause and the final decisions of the contracting officer were made prior to the effective date of the Contract Disputes Act of 1978 (P.L. 95-563). The principal decision of the Board found that none of the claims had

[2] Cases cited in the briefs are not discussed because the issue presented here of retroactive unsupported transfers of costs was not an issue in the referenced cases. Also, some of the cases cited relate to other types of contracts and to issues not present in this case.

been pending before the contracting officer on Mar. 1, 1979, the effective date of the Act, and that the lack of pendancy gave the Board no jurisdiction over the appeals.

Appellant filed a motion for reconsideration, and by decision dated Nov. 23, 1979, the Board reaffirmed the principal decision. On Nov. 28, 1979, appellant filed a new notice of appeal in these appeals on the grounds that the contracting officer had reconsidered the claims during the period from June 19 to Nov. 6, 1979, and that the appeals were pending before the contracting officer after the effective date of the Act to permit the Board to take jurisdiction of the appeals. The Government filed a motion to dismiss dated Feb. 1, 1980. By order dated Feb. 12, 1980, the Board required appellant to respond to the motion to dismiss and to support its request for a hearing by Mar. 7, 1980. Appellant's memorandum in support of its request for a hearing was filed with the Board on Mar. 5, 1980, and its response to the motion to dismiss on Mar. 7, 1980.

In the new notice of appeal dated Nov. 28, 1979, appellant urges that an exchange of correspondence initiated with the contracting officer by appellant on June 19, 1979, constituted a reconsideration of the dismissed appeals and a new adverse decision by the contracting officer. Appellant argues that this exchange of correspondence after the effective date of the Act affords jurisdiction to the Board. None of the documents relied on were furnished to the Board prior to issuance of the decision on reconsideration. By letter dated June 19, 1979, appellant forwarded to the contracting officer a report dated Apr. 26, 1979, prepared by Jackson & Prochnau, Inc., consulting forest engineers. Appellant's transmittal letter characterized the Prochnau report as relevant to the issue of claimed shortages of timber available to appellant on 12 contracts (including the four under which appeals had been dismissed) for the purchase of timber on Government land. By letter dated Sept. 28, 1979 (referring only to one contract with a pending claim), the District Manager of the Eugene, Oregon, office of the Bureau of Land Management responded giving the results of reviewing the Prochnau report, and again denied appellant's request for relief. He advised appellant of the reasons it considered the Prochnau report to be in error in its conclusion that there should only be small differences between timber recovery under the Bureau scaling standards and those of the Columbia River Scaling Bureau.

In a letter dated Oct. 9, 1979, appellant referenced only seven of its contracts (including the ones under which appeals had been dismissed). The letter stated:

> We appreciate your letter of September 28, 1979, concerning the Simonsen Road tract.
>
> You asserted in that letter that the Prochnau Report erred in its conclusion that substantial differences exist between BLM's method of scaling and other methods.

You may note that the Prochnau report was forwarded to you for your consideration because of our belief that as expert opinion it impacts on the other Gregory timber sale contract claims. Are we to infer that your comments about the Prochnau Report apply also to the other Gregory claims in the same manner you applied it to Simonsen Road?

The District Manager responded by letter dated Nov. 6, 1979, referencing only the Simonsen Road contract. He advised that the statement attributed to him was incorrect and that the Prochnau report claims that substantial differences *do not* exist between the two scaling methods (underscoring was used in the letter). He concluded with the following: "Essentially our disagreement with the Prochnau report involves basic mensurational principles. Therefore, we must answer the question raised in the last sentence of your letter in the affirmative."

The above exchange of correspondence is the basis for the claim that the contracting officer rendered a new adverse decision on the dismissed appeals.

Discussion and Findings

Appellant's memorandum in support of the hearing request recites a number of differences or issues raised by the Government's motion to dismiss to indicate there exists factual issues between the parties that require testimony of witnesses in a hearing to resolve. Admitting at the outset that the documents are determinative of appellant's right to appeal, appellant treats the arguments made by counsel for the Government as adding facts requiring resolution by testimony of witnesses. The factual issues confronting this Board are those that are inherent in the actions of the parties and, whether correctly perceived by the parties themselves, the factual differences cannot be enlarged by the arguments of opposing counsel. Appellant proposes witnesses to testify concerning the reason, and motivation for the actions forming the factual basis for the appeals. Absent fraud, which is not alleged, the actions of the parties are represented in a few documents or exchanges of correspondence. Unless given good cause to inquire into the motivation of a participant to a dispute, the undisputed recorded actions of the parties are evidentiary values for the Board to consider. Whether motivated by pressures from superiors, an excess of zeal or by other factors, it is the recorded actions of a responsible official or officials of either party that determines whether the contractual rights and obligations of the parties have been altered. The documents on which these new appeals are based have been provided by the parties. The documents speak for themselves.

The Board finds that the documentary evidence submitted by the parties to be sufficient to resolve the issue of whether the appeals are properly before this Board. The documents themselves have not been challenged so that the value of a hearing would necessarily be limited to testimony regarding the correct interpretation of the documents. We consider the interpreta-

tion of the documents to be a question to be resolved by the Board, aided by the arguments of both counsel; but we find that the testimony of witnesses concerning issues of motivation that are not in issue are not relevant to our deliberations. Therefore, we deny appellant's request for a hearing.[1]

The central issue involved in these appeals is whether the contracting officer rendered a new decision in the instant cases which is appealable to this Board. Appellant's letter of Sept. 28, 1979, does ask that the position of the Bureau concerning the referenced contracts be considered in light of the Prochnau report. The District Manager's response dealt only with the pending appeal on the Simonsen Road contract claim in denying the relief requested. The response went further to point out the shortcomings of the Prochnau report which was said to have been carefully studied before reaching a decision on the claim involving the Simonsen Road contract. The District Manager did not refer to any other specific claim. He referred to prior responses to claims of appellant to reiterate the position taken in denying the claims, which was that the purchase price is not contingent upon the volume of timber recovered by the purchaser. Clearly, he did not discuss appellant's request that the Government position on all the claims be reconsidered in the light of the Prochnau report, but rather reiterated the position consistently taken by the Government. Appellant recognized the District Manager had limited his consideration to the Simonsen Road contract in the opening sentence of the Oct. 9, 1979, letter and asked whether his comments on the Prochnau report could be inferred to apply to the other Gregory claims. The Government response was that the Government position respecting the Prochnau report had been misstated and that the question raised must be answered in the affirmative.

It is significant that the Prochnau report relates to the results of using different scaling methods to determine the amount of recovered timber. The Government has consistently taken the position on appellant's claims that the amount of timber recovered by them is not relevant to the lump-sum purchase price. Therefore, its review and response pertaining to the Prochnau report related to an issue that had not been considered relevant and continued to be considered to have no relevance to the Government's position.

Having recognized that the Government response to the Prochnau report was limited to the Simonsen Road contract, appellant's claim that there was reconsideration and a new decision by the contracting officer must rest on the final paragraph of the District Manager letter of Nov. 6, 1979. The subject of that letter is "Simonsen Road Timber Sale Contract 0R090–TS60–81."

[1] The right to a hearing is not absolute. *See Bateson-Cheves Construction Co.*, IBCA No. 670–9–67 (Oct. 8, 1968), 68–2–BCA 7289.

The concluding paragraph states a disagreement with the Prochnau report involving basis mensurational principles and affirms that such disagreement would apply equally to the other Gregory claims. It appears that if the Government disagreed with the conclusions of the Prochnau report as to the differences that would result from applying different standards of measurement, it would be incongruous to expect that the same reviewers would reverse that opinion to consider the report's conclusions to be valid on other similar claims. Therefore, appellant was asking a question that required no answer beyond that already given unless the question was asked for another purpose, *i.e.*, to attempt to breathe life into the dismissed appeals.

Assuming, *arguendo*, that the District Manager's response in final paragraph of the Nov. 6, 1979, letter was a direct response to "the other Gregory claims" referred to in appellant's letter of Oct. 9, 1979, the above-captioned appeals had been dismissed by this Board on Sept. 28, 1979. By letter dated Oct. 26, 1979, appellant requested reconsideration of the decision dismissing the appeals. The instant appeals were therefore pending before the Board on the date of the District Manager's letter of Nov. 6, 1979, and were not claims pending before the contracting officer (*see* principal decision). Consequently, the contracting officer's response could only relate to claims pending before him, and not the instant appeals then pending before the Board.

We find nothing in the correspondence indicating any intent to reconsider or actual reconsideration of the instant appeals by the contracting officer. At best, appellant's claim of a new contracting officer's decision rests on the fact that he may have inadvertently rendered a new decision by responding to a question requiring no answer beyond that already given. We find that the contracting officer did not reconsider the claims involved in the instant appeals and render a new decision thereon. The Government's motion to dismiss is granted. The appeals are dismissed with prejudice.[2]

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

ESTATE OF JOHN JOSEPH KIPP

8 IBIA 30

Decided *March 14, 1980*

Appeal from order by Administrative Law Judge David J. McKee denying petition for rehearing.

Above order affirmed; order determining heirs reversed in part and remanded.

[2] We note that appellant's response to the motion to dismiss incorrectly states that the appeals were previously dismissed without prejudice.

1. Indian Probate: Claim Against Estate: Generally

The Board is not limited in its scope of review of an Administrative Law Judge's disposition of claims and may exercise the inherent authority of the Secretary to correct a manifest injustice or clear error where appropriate.

2. Indian Probate: Claim Against Estate: Proof of Claim

It would defeat the intent of Congress, which has formulated strict rules for the Secretary to follow in the management of trust property, for claims arising from alleged agreements affecting trust realty to be allowed on the basis of mere parol evidence. The potential for fraud would otherwise be too great.

3. Indian Probate: Claim Against Estate: Generally

The amount of a claim which must be paid from trust assets is as crucial a decision as whether such claim should be paid at all. It would therefore be improper for the Administrative Law Judge to allow the agency superintendent to determine the amount of an approved claim which must be paid a general creditor based on future documentation of the creditor's exhaustion of an Indian decedent's non-trust assets.

4. Indian Probate: Claim Against Estate: Source of Funds for Payment

While the Department's regulations do not explicitly recite that trust assets may be utilized for the payment of general creditors' claims only after all other sources of compensation have been exhausted, this limitation is implicit in both the Department's regulatory plan for the payment of claims and in the nature of the trust relationship between the Secretary and Indian heirs of allotted lands. Any trustee, let alone the Secretary, would be derelict who generally commits trust funds to pay debts legally compensable from other sources.

5. Indian Probate: Claim Against Estate: Timely Filing: Generally

In accordance with 43 CFR 4.250, all claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under 43 CFR 4.211 (c) shall be filed prior to the conclusion of the first probate hearing and if they are not so filed, they shall be forever barred.

APPEARANCES: William B. Sherman, Esq., for appellants Aurice Kipp Show and Max Lee Kipp; James C. Nelson, Esq., for creditor Glacier County Bank.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

On Oct. 26, 1977, John Joseph Kipp died intestate at the age of 52 at Great Falls, Montana. He is survived by his widow, Betty Joy Kipp, and an adopted son, Martin James Kipp. Decedent was the beneficial owner of real property on the Blackfeet reservation in Montana held in trust by the United States under the provisions of the General Allotment Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331–358 (1976). The value of the trust real property for purposes of probate was estimated at $80,451.12 (including buildings on the land valued at $10,000). At the time of decedent's death, there were apparently no cash assets in his Individual Indian Money Account at the Blackfeet Agency. However, in addition to his trust property, dece-

dent possessed extensive assets in non-trust realty and personalty. Seven claims totaling more than $186,000 were presented against the trust estate in the proceedings below.

Two hearings were conducted in this probate, the second of which was a supplemental hearing on the sole issue of the estate's liability for claims of indebtedness previously filed. On Mar. 30, 1979, Administrative Law Judge David J. McKee entered an order determining heirs. Included in this order were separate rulings allowing or disallowing the various claims at issue.

Aurice Kipp Show, decedent's surviving sister, and Max Lee Kipp, a surviving brother, filed a petition for rehearing from the above order on May 4, 1979. The petitioners alleged that Judge McKee had erroneously denied their claims for unpaid rental allegedly due them by the deceased for the use of land. This petition was denied by Judge McKee by order dated June 6, 1979.

A notice of appeal from the order denying petition for rehearing was filed with the Board of Indian Appeals on Aug. 6, 1979, by William B. Sherman as counsel for Aurice Kipp Show and Max Lee Kipp. Appellants' opening brief was filed in this matter on Oct. 23, 1979. The only other brief received by the Board is a statement filed by James C. Nelson, counsel for the Bank of Glacier County, which received conditional approval from Judge McKee for its claim filed against the estate in the amount of $99,096.18.[1]

Scope of Review

[1] In the course of evaluating the Administrative Law Judge's disposition of appellants' claims, the Board has examined the basis on which other claims were either allowed or disallowed in this case. As a result of this review, it is considered necessary in this decision to reverse the Judge's allowance of one of these claims and to qualify the extent to which other claims approved by the Administrative Law Judge and from which no appeal was taken are, under law, actually payable. This expanded consideration of the decision appealed from is authorized by 43 CFR 4.290 which states in part: "The Board shall not be limited in its scope of review any may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

Discussion, Findings and Conclusions

In his order determining heirs, the Administrative Law Judge ruled on seven separate claims against decedent's estate as follows:

[1] Decedent's widow, Betty Joy Kipp, has submitted several statements urging expedited resolution of this appeal without addressing the merits of appellants' claims. Counsel James W. Zion, Helena, Montana, submitted a certificate of representation to the Board on behalf of the Mildred Kipp, descedent's former spouse, but no brief or other statement was subsequently filed.

1. Denied claim of Aurice Kipp Show (appellant herein) in the amount of $14,953.50, allegedly due on an oral promise to compensate for use of trust land.

2. Denied claim of Max Lee Kipp (appellant herein) in the amount of $7,226.75, allegedly due on an oral promise to compensate for use of trust land.

3. Denied claim of Woodrow Kipp, a brother of decedent, in the amount of $2,500, allegedly due on an oral promise to compensate for trust land acquired by gift deed.

4. Approved claim of the Blackfeet Tribe in the amount of $4,517.30 for unpaid balance on a loan which was secured by a Departmentally approved Assignment of Trust Property and Power to Lease dated Oct. 26, 1959.

5. Approved claim of Bank of Glacier County in the amount of $99,096.18, secured in part by liens on non-trust property and assets, to the extent such unpaid indebtedness is not satisfied by "the total liquidation of all non-trust security held by the Bank."

6. Approved claim of Good-Tabaracci, Inc., in the amount of $1,875 (plus interest) for unpaid balance on crop hail insurance.

7. Approved claim of Mildred Kipp, former spouse of decedent, in the amount of $55,000 based on State court divorce decree and subject to limitation that deduction be made for "amounts already paid thereon from whatever source."

For the reasons set forth below, the Board affirms the Administrative Law Judge's disposition of Claim Nos. 1 through 4 as enumerated above; remands for further proceedings the disposition of Claim Nos. 5 and 6; and reverses the ruling on Claim No. 7.

[2] The claims of Aurice Kipp Show, Max Lee Kipp, and Woodrow Kipp are not allowable for the simple reason that insufficient proof was offered by these claimants to establish a legal indebtedness of the decedent to them. By law, it was incumbent on those either leasing or deeding any interest in trust lands to the decedent during his lifetime to obtain Departmental approval. *See* 25 CFR 121.17–121.23 and 25 CFR Part 131.[2] Yet, no records were produced by these claimants in support of their claims that the decedent either acquired trust land or the use of trust land from them through a compensation agreement.

In short, it would defeat the intent of Congress, which has formulated strict rules for the Secretary to follow in the management of trust property, for claims arising from alleged agreements affecting trust realty to be allowed on the basis of mere parol evidence. The potential for fraud would otherwise be too great.

In contrast to Claim Nos. 1 through 3 above, the Blackfeet

[2] The statutory authority for these regulatory requirements appears in scattered secs. of volume 25 of the *United States Code*. For complete listings, see "Authority" preface to the rules cited.

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Tribe produced competent evidence of a valid claim against decedent's estate. The indebtedness was proven by documentary evidence and, in accordance with statute, the encumbrance on decedent's trust property had received Departmental approval. *See* 25 U.S.C. § 483a (1976).[3]

The claim by the Bank of Glacier County was also supported by documentary evidence. Unlike the claim of the Blackfeet Tribe, however, it is not secured by any liens against decedent's trust property. Under the circumstances, it was correct for the Administrative Law Judge to allow this claim as one established by any other general creditor, pursuant to the provisions of 43 CFR 4.250–4.251.

[3] However, it appears from the order approving the bank's claim that the specific amount of compensation to be given this creditor was left to the agency superintendent to decide, based on future documentation of the bank's exhaustion of decedent's non-trust assets.[4] Such a procedure is improper.

The amount of a claim which must be paid from trust assets is as crucial a decision as whether such claim should be paid at all. This fact is patently clear where, as here, the amount claimed exceeds the estimated value of the trust estate as a whole. The Department's regulatory scheme for the payment of claims, found in 43 CFR 4.250–4.252, clearly envisions that the Administrative Law Judge presented a claim will decide the amount of payment, if any, to which a claimant is entitled. *See also* 43 CFR 4.240(a)(3). This decision often bears on mixed questions of fact and law, as cited in the foregoing regulations, and, where even on fact alone, it remains a matter which is best decided in a quasi-judicial setting. Simply stated, what the Superintendent should hear from the Administrative Law Judge is how much to pay a creditor on a proven claim.[5]

There is a similar problem with respect to the claim of Good–Tabaracci, Inc. That is, the record is devoid of any evidence that this general creditor's claim cannot be satisfied from non-trust assets of the decedent.

[4] While the Department's regulations do not explicitly recite that trust assets may be utilized for

[3] The tribe's claims is allowable in this case as a preferred claim notwithstanding the fact it could obtain redress by means of foreclosure or other methods prescribed in its lending agreement with decedent. Since there was no objection to the tribe's claim, it is presumed the heirs at law preferred settlement of the estate's indebtedness to the tribe through the probate claims procedure rather than possibly losing certain lands by foreclosure. *See* and compare *Estate of Lawrence Ecoffey*, 5 IBIA 85 (1976); *Acting Associate Solicitor's Memorandum (Indian Affairs) to Examiner Montgomery*, A–58–1104.9A (Apr. 14, 1958).

[4] *See* Order Determining Heirs dated Mar. 30, 1979, at pp. 5–7.

[5] In some cases, this will require retention of jurisdiction over a case by the Administrative Law Judge until a creditor can prove that non-trust assets or other securities have been exhausted and that a sum certain from the trust estate is therefore owing.

By regulation, there is one exception to the principle that only the Administrative Law Judge may determine and award claims. At 43 CFR 4.271 it is provided that agency superintendents may determine and award creditors' claims when the value of a deceased Indian's trust personal property and cash is less than $1,000.

the payment of general creditors' claims only after all other sources of compensation have been exhausted, this limitation is implicit in both the Department's regulatory plan for the payment of claims [6] and in the nature of the trust relationship between the Secretary and Indian heirs of allotted land.[7] For that matter, any trustee, let alone the Secretary, would be derelict who generally commits trust funds to pay debts legally compensable from other sources.[8]

The Board sees no recourse but to remand this matter to the Administrative Law Judge [9] for the receipt of evidence and entry of a specific order allowing the claims of the Bank of Glacier County and Good–Tabaracci, Inc., in specific amounts authorized by law and Departmental regulations.

[5] Finally, the claim of Mildred Kipp should have been disallowed by the Administrative Law Judge as untimely filed. At 43 CFR 4.250 (a), it is provided:

> (a) All claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under § 4.211(c) shall be filed with either the Superintendent or the Administrative Law Judge prior to the conclusion of the first hearing, *and if they are not so filed, they shall be forever barred.* [Italics supplied.]

Mildred Kipp filed her claim with the Administrative Law Judge on Aug. 28, 1978, one day before the second hearing held in the probate of decedent's estate. The first hearing was held May 9, 1978, and it was prior to the conclusion of such

[6] Note, for example, 43 CFR 4.250(b) which states in part: "[C]laims shall show the names and addresses of all parties in addition to the decedent from whom payment might be sought."

[7] Consistent with the Secretary's trust responsibility to Indian heirs of allotted land, it has long been recognized by the Department that claims against an estate may not be enforced through the sale of trust lands. *Estate of John J. Akers,* 1 IBIA 246, 259 (1972).

[8] In a dissenting opinion in this case, it is submitted that because allotted lands are not subject to liens of indebtedness incurred while title is held in trust (25 U.S.C. § 354 (1976)), the Secretary lacks authority to administratively allow claims against trust estates.

During the 70 years in which the Department has been allowing claims against trust estates, only one Federal district court has used the above argument to disallow a claim. *Running Horse* v. *Udall,* 211 F. Supp. 586 (D.D.C. 1962). There, the court held that the Secretary could not compensate a state for old-age assistance payments rendered a deceased Indian from trust assets of the deceased. Departmental regulations were subsequently changed to accommodate the court's holding. *See* 43 CFR 4.250(g). Notwithstanding the possible merits of the dissenting opinion, it remains beyond the authority of this Board to declare invalid the various regulations of the Department allowing the payment of claims.

For the proposition that the Secretary possesses implied legal authority to allow claims in Indian probate proceedings held in accordance with 25 U.S.C. §§ 372–373 (1976), *see* Felix Cohen's *Handbook of Federal Indian Law* at 231 (U.N.M. ed. 1971); *Solicitor's Opinion.* 61 I.D. 37 (1952); 25 U.S.C. § 373a (1976) (an Act adopted in 1942 relating to escheat wherein Congress expressly authorizes the Secretary to pay creditors' claims); and *Estate of Martin Spotted Horse, Sr.,* 2 IBIA 265, 81 I.D. 227 (1974). In addition to the foregoing, we merely note the following: To the extent that Indians exist daily on lines of credit furnished them by grocers, doctors, and other life-blood creditors, it is difficult to perceive the good of a rule which would either deny them this lifestyle or seriously impair it through some form of "Departmental approval" requirement.

[9] Administrative Law Judge McKee has retired. Remand will therefore be made to his successor, Administrative Law Judge Alexander H. Wilson.

hearing when Mildred Kipp was required to file her claim.[10]

Therefore, by virtue of the authority delegated the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge David J. McKee, dated June 6, 1979, denying appellants' petition for rehearing, is affirmed. However, the Order Determining Heirs dated Mar. 30, 1979, is reversed as to that part of the decision allowing the claim of Mildred Kipp. Further, this estate is remanded to the Administrative Law Judge with jurisdiction over the matter to receive evidence and make specific findings, conclusions and orders as to the amount of compensation, if any, the Bank of Glacier County and Good-Tabaracci, Inc., are entitled to receive from the Department consistent with this opinion and the regulatory requirements of 43 CFR 4.250–4.252.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

MITCHELL J. SABAGH
Administrative Judge

[10] It is noted that Mildred Kipp has a remedy at law for satisfaction of her claim by virtue of the decree of divorce entered in Probate No. 2972, District Court of the Ninth Judicial District, State of Montana, County of Glacier, on Jan. 2, 1975. The foregoing judgment does not purport to affect decedent's trust property. If it does, it is to such extent voidable. *See Mullen* v. *Simmons*, 234 U.S. 192 (1914).

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

Presentation of creditors' claims to the Administrative Law Judge during probate against decedent's interests in allotted trust lands raises issues in this probate which require construction of provisions of the General Allotment Act, the Act of Feb. 8, 1887, 24 Stat. 388, 390 (25 U.S.C. §§ 331, 349 (1976)). The Allotment Act is characterized thus by the Court of Appeals for a circuit where a large amount of allotted land is situated: "The paternalism that characterizes the Allotment Act undoubtedly now offends many Indians and non-Indians, but we are free neither to rewrite history nor to redraft the Act to conform to our notions of contemporary social attitudes" (*Akers* v. *Morton*, 499 F.2d 44, 48, n.3 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975)).

The main purpose of the General Allotment Act is to end the tribal and nomadic ways of life among the Indians, to encourage family farming among them, to protect the allottees' interest in their trust lands and provide their families with permanent homes (*Hopkins* v. *United States*, 414 F.2d 464 (9th Cir. 1969)). Sec. 1 of the Act, 25 U.S.C. § 331 (1976), provides for allotments to individuals for agricultural purposes. After 25 years the United States is to "convey * * * [a patent] to said Indian, or his heirs * * * in fee, discharged of said trust and free of all charge or incumbrance" (25 U.S.C. § 348 (1976)).

When the fee patent is given, the lands shall then become subject to state law, but until then, "[S]aid land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent" (25 U.S.C. § 349 (1976)). The President extended the trust period (to the lands here in issue) until the period of trust responsibility was extended indefinitely by the Indian Reorganization Act of 1934 (Act of June 18, 1934, 48 Stat. 984 (25 U.S.C. § 462 (1976)). The 1887 Act contains no exception to the provision prohibiting encumbrance of the land allotted prior to discharge of the trust: If such exceptions exist, they must appear in later enactments.

The development of an elaborate scheme of probate administration by the Secretary was probably not in contemplation of Congress in 1887 when the General Allotment Act became law. Pursuant to the Act the Secretary divided the reservations affected into allotments which were distributed to individual Indians subject to restrictions against alienation.[1] The continued extension of the trust period, however, made some sort of probate procedure appear necessary. The current probate practices derive from the Act of June 25, 1910,[2] which made the administration of the estates of individual Indians the exclusive province of the Secretary, subject to infrequent judicial review of decisions.[3]

The practice of allowing claims began immediately following the 1910 statutory probate enactments and was formalized in Departmental regulations.[4] The regulations promulgated in 1935 reflect the policies applied in earlier Departmental orders in probate cases decided in the course of the Secretary's administration of Indian estates, and present the same general scheme as regulations currently in effect published at 43 CFR Part 4, Subpart D.[5] The early creditors'

[1] The Blackfeet reservation is one of the reservations directly affected by the Act; it was created by the Act of Apr. 15, 1874, 18 Stat. 28.

[2] 36 Stat. 856, 25 U.S.C. § 373 (1976), *as amended*. The evolution of Departmental probate practice is traced in the introduction to *Digest of Federal Indian Probate Law*, Office of Hearings and Appeals (1972). Currently, the probate of Indian trust estates is administered by Indian probate Administrative Law Judges under the provisions of Departmental regulation 43 CFR Part 4, Subpart D, whose administration of probate matters is reviewable by this Board in the Office of Hearings and Appeals, Department of the Interior. 36 FR 7186 (Apr. 15, 1971); 36 FR 24813 (Dec. 23, 1971).

[3] *See Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970), for a discussion of judicial review of Departmental probate proceedings. Early cases established that the power of the Secretary to handle these matters was virually exclusive. *McKay* v. *Kalyton*, 204 U.S. 458 (1907); *Hy-yu-tse-mil-kin* v. *Smith*, 194 U.S. 401 (1904); *Bond* v. *United States*, 181 F. 613 (C.C. Or. 1910).

[4] Following the June 25, 1910, Act, regulations were issued in 1910 by the Secretary; regulations were again published in 1915, and revised in 1923 and 1935. *Determination of Heirs and Approval of Wills of Indians Except Members of the Five Civilized Tribes and the Osages, Regulations. May 31, 1935*, 55 I.D. 263.

[5] Specifically 43 CFR 4.250 through 4.252. Previously appearing at 25 CFR Part 15, the probate regulations were republished at 43 CFR Part 4 in 1971, concurrent with the establishment of the Office of Hearings and Appeals. 43 CFR 4.252, the section of the regulation construed by this opinion, appears for the first time in that publication of the Rules. 36 FR 24813 (Dec. 23, 1971).

claims appear to have been for relatively insignificant amounts which were small in relation to the trust estate; the payment to the creditors was often made in a reduced amount or denied altogether if the estate was small or the condition of the heirs seemed to warrant reduced payment or denial of payment.[6]

However, except as provided by Congress, the Secretary is not authorized to allow debts incurred by an Indian decedent to be a charge or encumbrance against the decedent's trust property in the hands of his Indian heirs (25 U.S.C. § 349 (1976); *Squire* v. *Capoeman*, 351 U.S. 1 (1956); *House* v. *United States*, 144 F.2d 555, *cert. denied*, 323 U.S. 781 (1944); *Running Horse* v. *Udall*, 211 F. Supp. 586 (D.D.C. 1962); *Estate of Phillip Tooisgah*, 4 IBIA 541, 82 I.D. 541 (1975), *aff'd Tooisgah* v. *Kleppe*, 418 F. Supp. 913 (W.D. Okla. 1976); Solicitor's Opinion M-36066 (Feb. 3, 1959)). Not only does the Act of June 25, 1910, not provide for the allowance of creditors' claims against such estates, the Act of Feb. 8, 1887, specifically forbids the practice.[7] Congress has, however, created several statutory exceptions to the general rule established by the 1887 Act. Thus, provision is made for payment of creditors' claims from estates which escheat (Act of Nov. 24, 1942, 56 Stat. 1021, 25 U.S.C. § 373a and b (1976)). Encumbrance is permitted also, where the Secretary previously has approved a mortgage of the trust property during the decedent's lifetime (25 U.S.C. § 483a (1976))

[6] *See*, for example, *Estate of Samuel John Eagle Horse*, Probate 165.1 (Sept. 6, 1911), where claims totaling $392.30 were disallowed against an estate composed of $30.80 in cash and trust land valued at $665.81.

Most reported instances involving Departmental approval of creditors' claims appear after 1910. Representative claims, usually for less than $100, include claims for groceries and auto repairs (*Estate of Phillip American Bear*, Probate 1818-33 (Dec. 2, 1933)); repayment of prior approved loans (*Estate of Noah Bad Wound*, Probate 78151-38 (May 9, 1939)); support of decedent by maternal grandmother (*Estate of Mary Bear Looks Behind*, Probate 102279-21 (Dec. 20, 1921)); casket (*Estate of Black Eagle*, Probate 36381-34 (Apr. 18, 1935)); nursing care (*Estate of Black Hawk*, Probate 63211.30 (Jan. 28, 1935)); clothing (*Estate of Blue Eyes*, Probate 36659-26 (June 21, 1933)); abstractor's fee (*Estate of William Carpenter*, Probate 55428-34 (Mar. 29, 1935)); alimony and child support (*Estate of Eleanora Devine*, Probate 33411.29 (July 23, 1929)); State old age assistance (*Estate of Lucy Little Tail*, Probate 25973-38 (July 20, 1943)); surgeons fees and hospital bills (*Estate of Fred Loudner*, Probate 14035 (Apr. 3, 1935)); "luxury items" (*Estate of William Palmier*, Probate 17609-35 (June 21, 1935)); gasoline, oil, tires, chains, car battery, and coal (*Estate of Charles Roubideaux, Sr.*, Probate 86116 (May 24, 1937)); hauling wood and water (*Estate of Sharp Pointed*, Probate 11948.36 (Sept. 30, 1936)); tribal court judgment (*Estate of Lucy Spotted Crow*, Probate 20370-32 (Aug. 8, 1932)); car repair and restaurant bill (*Estate of Foster Thunderhawk*, Probate 31837-26 (Feb. 27, 1940)); and a loan secured by a note (*Estate of Benjamin Quapaw*, Probate 28998-20 (Mar. 14, 1927)).

[7] Questions concerning the availability of assets to satisfy unpaid claims usually focus on income derived from the land rather than the land itself, since the prime reason for holding the land in trust is to keep it unencumbered. It now appears settled that income derived directly from the land is also trust property and cannot be encumbered. (This has not always been clearly the rule, however. *See Jones* v. *Taunah*, 186 F.2d 445 (10th Cir. 1951), *rev'd*, in *Squire* v. *Capoeman*, *above*.) What constitutes income derived directly from the land may be difficult to ascertain in some cases but farm land being farmed by the beneficial owner produces income that retains the trust character *Critzer* v. *United States*,— Ct. Cl.—(Apr. 18, 1979), 47 U.S.L.W. 2684.

or the creation of a security interest in cash trust assets for purposes consistent with the exercise of the trust responsibility (25 U.S.C. § 410 (1976)). The Departmental creditors claims regulation, 43 CFR 4.252, recognizes the limited scope within which payment of claims may be made, providing they may be allowed only to the extent not "prohibited by law." There appears to be no reason why a procedure for obtaining prior approval of commercial claims could not be devised within the statutory framework. (Mortgages under 25 U.S.C. § 483a are currently administered pursuant to 25 CFR 121.34.)

A 1952 Solicitor's opinion takes official notice that secs. 1 and 2 of the Act of June 25, 1910, contain no provision for the allowance of creditors' claims (Solicitor's Opinion, 61 I.D. 37 (1952)).[8] Despite the absence of statutory authority for the payment of such claims, however, the opinion finds an implied authority in the Secretary to approve creditors' claims, based upon reasoning that accepts analogy to state probate proceedings as a necessary part of the distribution of Indian estates. The position expressed by the 1952 opinion apparently represented the position of the Department until 1962, when the opinion in *Running Horse* v. *Udall*, *above*, held the Departmental position as stated by the Solicitor to be erroneous while holding a creditor's claim invalid based upon analysis of the 1887 Allotment Act and the Act of June 25, 1910.

In *Running Horse* an order determining heirs had allowed payment from trust assets to be made to the creditor State of South Dakota, a practice the court found to be beyond the authority of the Secretary where there were living heirs who were denied the benefit of the trust property which was subject to the Secretary's administration pursuant to the General Allotment Act.[9] The interaction of the 1887 Act and the 1910 Act was considered by the

[8] The opinion indicates concern about the continuing Departmental practice of allowing claims against trust estates, in light of enactment of an escheat statute expressly providing for allowance of creditors' claims against trust estates, apparently as an express exception to the general rule that claims against such property are unenforceable. The opinion concludes that the claims practice based upon custom should continue, but that some regulatory reform is required in order to provide a basis for such payments.

[9] 211 F. Supp. at 588. The court first found at p. 587, in a fact situation nearly identical to that in this probate, that:

"4. The land referred to above originally was allotted by trust patent No. 276674 dated June 18, 1912, from the United States to Abraham Running Horse, Rosebud Sioux Allottee No. 6095, and inherited by James Running Horse from the trust patentee. The trust patent was issued under the Sioux Allotment Act of March 2, 1889, 25 Stat. 888, which by reference incorporates the provisions of Section 6 of the General Allotment Act of February 8, 1887, 24 Stat. 390, 25 U.S.C. § 349, as amended. Under the terms of the Sioux Allotment Act, the United States agreed to hold the land, 'in trust for the sole use and benefit' of Abraham Running Horse or, in the case of his death, of his heirs; and further agreed, upon the expiration of the trust period, to convey the land to Abraham Running Horse or, in case of his death, to his heirs, 'in fee, discharged of said trust and free of all charge or incumbrance whatsoever: * * *'; and further agreed that such trust lands 'shall not be liable to the satisfaction of any debt contracted prior to the issuing of such [fee] patent: * * *.' The trust period is now and has been in effect at all times material to this case."

opinion, which concluded that no implied authority to allow creditors' claims could be derived from a statutory scheme which expressly forbids any encumbrance of the land which is the subject of the legislation. The reasoning of the court in *Running Horse* thus disapproves the logic of the 1952 Solicitor's opinion. The rationale for allowing creditors' claims stated in the 1952 opinion, however, later became the basis for the opinion in the *Estate of Martin Spotted Horse*, 2 IBIA 265, 81 I.D. 227 (1974), relied upon by the majority opinion.

The opinion in *Spotted Horse* allowed three creditors' claims, two of which had not been given prior Secretarial approval, and which, therefore, lacked a specific statutory basis. *Spotted Horse* repeats the rationale of the 1952 Solicitor's opinion struck down by the district court. No attempt is made to distinguish the holding in the *Running Horse* decision, although there is an inference in *Spotted Horse* that *Running Horse* is limited to its facts. (The amendment of Departmental regulations to provide that state old age assistance claims are not payable from trust assets seems to confirm that this became the Departmental position.) Such an interpretation recognizes a claims practice that has been followed since 1910, but ignores the *Running Horse* holding that "[t]he Secretary is not authorized by law to allow debts incurred by an Indian decedent as a charge or encumbrance against the decedent's trust property in the hands of his Indian heirs." [10] *Running Horse* and *Spotted Horse* simply cannot be reconciled.

It is a general rule of construction in statutes involving Indian affairs that doubtful statutory language must be interpreted in favor of the Indians. *Worchester* v. *Georgia*, 31 U.S. (6 Pet.) 214 (1832); *Bryan* v. *Itasca County, Minnesota*, 426 U.S. 373 (1976). In the case where creditors seek to encumber trust property established by the General Allotment Act, however, there is no ambiguity. The 1887 Allotment Act forbids allowance of encumbrances prior to termination of the trust status of allotted lands. Restrictions on lands imposed by the General Allotment Act run with the land: not being personal to the individual allottee, the restrictions continue until the time set for their expiration by Congress. *Bowling* v. *United States*, 233 U.S. 528 (1914); *United States* v. *Noble*, 237 U.S. 74 (1915); *Couch* v. *Udall*, 404 F.2d 97 (1968). The restriction is not affected by the death of the original allottee, nor by changes in the personal status of the allotment holder. *Oklahoma Gas & Electric Co.* v. *United States*, 609 F.2d 1365 (10th Cir. 1979). Whatever the situations of the original allottees and their families may have been in the first half of the twentieth century, which may perhaps have led the Depart-

[10] *Id.* at p. 588. More importantly, the position taken ignores the *Running Horse* reasoning and the legal basis for the holding, which is unassailable.

ment to pay creditors' claims from trust assets, the conditions of the second half of the century exemplified by the estate here in probate indicate that creditors' claims presented against the trust estate of a small farmer are considerable, and are capable of effectively eliminating existing allotments.

The trust estate here in probate is only a part of the total estate of the decedent: The record indicates the greater part of his estate is in probate in the state district court, while certain personal effects are subject to the jurisdiction of a tribal court established pursuant to 25 CFR Subchapter B, Part 11. Three different tribunals—State, Departmental, and tribal are now administering parts of decedent's estate. This situation exposes the fallacy in the thesis that the Departmental practice must afford to commercial and other creditors the same rights they would enjoy if the trust estate were unrestricted: to afford the benefits of the Allotment Act to decedent's heirs does not deprive his creditors of a forum for presentation of their claims.

The majority opinion expresses concern that a holding which exempts trust property from all creditors' claims will result in a denial of credit to allottees and their heirs by the general commercial community. It overlooks the statutory exceptions permitting certain mortgages and encumbrances of personalty. And it assumes that the allottees have no other assets—an assumption which is demonstrably false in this instance. The majority position shows a willingness to "redraft the act to conform to our notions of contemporary social attitudes." [11]

Congress exercises plenary power in the area of Indian affairs. *United States* v. *Kagama*, 118 U.S. 375 (1886). In the case of the restriction against encumbrance it imposed upon trust lands with the passage of the 1887 Allotment Act, it has created several exceptions. Trust lands can be encumbered by the beneficial owner with the prior approval of the Secretary, for approved purposes, as was done in the case of the mortgage given by decedent to the Blackfeet Tribe (25 CFR 121.34, implementing 25 U.S.C. §§ 483a, 410 (1976)). The very existence of the statutory exceptions indicates that, in the case of the General Allotment Act, as with Indian legislation in general, it is not proper to graft interpretations unfavorable to Indians onto the Act without express authority for such a position. (*Bryan* v. *Itasca County*, *above*.) If exceptions are intended to the general rule that there shall be no encumbrance of trust lands in the hands of allottees or their living heirs, Congress must

[11] Allowance of the exemption for this class of property from the claims of creditors merely recognizes a class of property to be exempt from such claims in addition to the exemptions permitted by State laws. The record of this case indicates that, except for the tribe, none of the creditors placed any reliance upon the trust property when they extended credit to decedent.

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enact those exceptions in specific legislation.[12]

Of the seven claims presented against the estate, only one was presented for prior approval by the Secretary during decedent's lifetime pursuant to provisions of 25 U.S.C. § 483a (1976). The claim of the Blackfeet Tribe is entitled to approval for payment subject to the limitations stated at 43 CFR 4.251 (d). The remaining claims are barred by the provisions of 25 U.S.C. § 349 (1976). The estate should therefore be remanded to the Administrative Law Judge with instructions to disapprove all creditors' claims except the claim by the Blackfeet Tribe.

FRANKLIN ARNESS
Administrative Judge

CHEYENNE RESOURCES, INC.

46 IBLA 277

Decided *March 27, 1980*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease offer W 68690.

Affirmed.

[12] While the rule urged by this opinion would change Departmental practices, the continued adherence to an erroneous practice cannot be justified merely to avoid disruption of customary usage. This Board has the authority to announce such a change in Departmental practice. *United States* v. *Winegar*, 16 IBLA 112, 81 I.D. 370 (1974), *rev'd on other grounds sub nom. Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977). See Solicitor's Opinion, 84 I.D. 54, 62 (1976); Solicitor's Opinion, 84 I.D. 443, 453 (1977); Solicitor's Opinion, 86 I.D. 307, 318 (1979).

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: First-Qualified Applicant

An oil and gas lease offer filed in the name of a corporation in a simultaneous filing is properly rejected where it is not accompanied either by corporate qualification papers or by any reference to a serial number where such information might be found, as required by 43 CFR 3102.4–1. Such omissions cannot be cured after the drawing.

2. Administrative Procedure: Hearings—Hearings—Oil and Gas Leases: Applications: Generally—Rules of Practice: Hearings

Where a corporate simultaneous oil and gas lease offeror alleges no facts which could disprove its failure to comply with 43 CFR 3102.4–1, no hearing will be granted as requested.

3. Administrative Procedure: Decisions—Board of Land Appeals

As precedents, decisions of the Board of Land Appeals should be cited by the volume and page number given on the bottom of the page of the decision and not to the IBLA docket number shown on the top of the decision.

4. Administrative Practice—Administrative Procedure: Decisions—Board of Land Appeals—Bureau of Land Management

Decisions of the Interior Board of Land Appeals are indexed, digested, and available for public inspection pursuant to published Departmental regulations. They meet the requirements of the Administrative Procedure Act and serve as binding Departmental precedents. However, adjudicative decisions by local Bureau of Land Management offices do not meet requirements of the Administrative Procedure Act and are not binding precedents.

APPEARANCES: Robert R. Spatz, President, Cheyenne Resources, Inc.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Cheyenne Resources, Inc., appealed from the July 27, 1979, decision of the Wyoming State Office, Bureau of Land Management (BLM), which rejected its simultaneous oil and gas lease offer W 68690 for Parcel No. 1696 of the June 1979 list. The offer was filed in a simultaneous drawing procedure held pursuant to 43 CFR Subpart 3112. BLM rejected this drawing entry card offer, executed on behalf of Cheyenne Resources, Inc., because it was accompanied neither by evidence of corporate qualifications nor by any reference to a previously filed statement of corporate qualifications.

Appellant argues primarily that shortly after the drawing it referred BLM to its corporate qualifications on file; that rejection contradicts 43 CFR 3112.5; that BLM's cited authority, a Board decision, is "unpublished, unindexed and unpromulgated"; and that the rejection is arbitrary and capricious. Appellant also requests a hearing on various matters, including BLM guidelines, procedures, and regulations relating both to simultaneous and competitive oil and gas lease offers.

The determinative question in this case is whether appellant's offer complied with regulation 43 CFR 3102.4–1 which specifies in pertinent part:

> If the offeror is a corporation, the offer *must* be accompanied by a statement showing * * * (b) *that it is authorized to hold oil and gas leases* and that the officer executing the lease is authorized to act on behalf of the corporation in such matters, * * *. Where such material has previously been filed a *reference by serial number to the record in which it has been filed*, together with a statement as to any amendments *will be accepted*. [Italics supplied.]

[1] The Board has held repeatedly that this regulation is mandatory. Corporate offers which lack corporate qualification papers or the reference to previous filings must be rejected, *Anchors & Holes, Inc.*, 33 IBLA 339 (1978); *Dal Metro Investment Co.*, 29 IBLA 198 (1977), and cases cited. Appellant left blank that space on its drawing entry card which called for the serial number of the record of any previously filed corporate qualifications. Under the simultaneous drawing procedures, an oil and gas lease must be issued to the first-qualified applicant. 43 CFR 3112.4–1 and .5–1. "The Secretary is bound by his own regulation so long as it remains in effect. He is also bound * * * to treat alike all violators of his regulation." *McKay* v. *Wahlenmaier*, 226 F.2d 35, 43 (D.C. Cir. 1955). Because of its omission, appellant was not the first-qualified offeror.

A first-drawn simultaneous drawing entry card, defective for non-

compliance with 43 CFR 3102.4–1, cannot be cured by submission of additional information after the drawing. *Don C. Bell II, Trustee*, 42 IBLA 21 (1979). Giving an unqualified first-drawn entrant additional time to file infringes on the rights of the second-drawn offeror. *Ballard E. Spencer Trust, Inc.* v. *Morton*, 554 F.2d 1067 (10th Cir. 1976), *aff'g*, *Ballard E. Spencer Trust, Inc.*, 18 IBLA 25 (1974). Thus, appellant's attempts to remedy the omission after the drawing could not cure the defect which required rejection.

Competitive leasing differs from simultaneous oil and gas leasing in that certain minor defects can be cured after the high bidder is chosen. The essential element of a simultaneous, noncompetitive lease offer is determination of the first-qualified offeror, whereas the amount bid is the determinative factor in the competitive leasing scheme. *Alaska Oil and Minerals Corp.*, 29 IBLA 224, 231, 84 I.D. 114, 118, n.1 (1977); *Ballard E. Spencer Trust, Inc., supra.* In competitive leasing, there is no second drawee whose rights would be infringed by cure of minor defects.

[2] Appellant requests a hearing. For the Board of Land Appeals to grant a hearing, in exercise of its discretion under 43 CFR 4.415, the appellant must allege facts which, if proved, would entitle it to the relief sought. *Foote Mineral Co.*, 34 IBLA 285, 85 I.D. 171 (1978); *Rodney Rolfe*, 25 IBLA 331, 83 I.D. 269 (1976). Here, the appellant has alleged no fact which, if proved, would compel a different legal conclusion. As we noted before, appellant's drawing card refers to the requirement in the regulations and also has a space for referencing the serial number where corporate qualifications have previously been filed. Nothing in appellant's lengthy appeal can excuse its failure to comply with the clear regulatory requirement.

[3] Most of appellant's arguments and all the matters upon which it requests a hearing are completely irrelevant to the crucial issue here of noncompliance with the regulation. Appellant has used a shotgun approach of attacking BLM and requesting a hearing on various types of administrative and policy functions. The only matter of any relevance here which has been raised by appellant is a citation error in the BLM decision. Although the decision correctly referred to the pertinent regulation, 43 CFR 3102.4–1, it added as a citation, "See *Pan Ocean Oil Corporation*, IBLA 71–112, April 12, 1971." This citation form is not correct. The number given is on the decision, but it is the number under which the appeal was docketed with this Board. This number is given at the top of the decision, but should not be used when citing a decision as precedent. The appropriate form for citing a decision of the Board of Land Appeals is by giving the name of the case, volume number of the decision, page number, and then the year of the decision. The vol-

ume and page numbers are given at the bottom of each page of the decisions. The first page of the decision is used for citation purposes. Thus, the appropriate citation should have been *Pan Ocean Oil Corporation*, 2 IBLA 156 (1971), and the decision could readily have been found at page 156 of Volume 2 of the Board's decisions in its loose-leaf service.[1] This citation error is harmless because the consequences of the regulation are clear.

[4] In order to apprise appellant and others concerning Board decisions used as precedents in decisions, we point out the following. The availability of decisions by this Board is governed by Departmental regulations set forth at 43 CFR 2.2. Paragraph (a)(1) and subparagraph (ii) provide that such decisions are available for inspection and copying in the Office of Hearings and Appeals, Ballston Bldg. No. 3, 4015 Wilson Blvd., Arlington, Virginia 22203. Paragraph (3) of the regulation refers to the Index-Digest issued by this Department wherein certain opinions, including those by the Board of Land Appeals, are covered in the Index-Digest. Pursuant to the regulation, the Index-Digest is available for use by the public at the above address and also in the Docket and Records Section, Office of the Solicitor, Interior Bldg., Washington, D.C. 20240, and in the offices of the Regional Solicitors and Field Solicitors. While the regulations do not so require it, the Index-Digest and Board decisions should also be available at most BLM offices, at least, the State Offices. They may also be found in many good law libraries. We note that the *Pan Ocean Oil* decision could have been readily identified from either the name of the case list or through perusal of subject headings in the Index-Digest where the correct citation is given. It also could have been identified by this Board if inquiry had been made.

Because the Board of Land Appeals decisions are indexed and made available to the public in accordance with published rules, as described above, they may be "relied on, used, or cited as precedent" by Departmental officials, including those in BLM, in accordance with the Administrative Procedure Act, 5 U.S.C. § 552(a)(2) (1976).[2] Therefore, while Board of Land Appeals decisions serve as binding precedents for BLM, decisions of local BLM offices are not in the same category, not being final if an appeal is taken, not being indexed and

[1] Certain Board decisions are also published in the bound volumes, *Decisions of the Department of the Interior* (cited as I.D.). An additional citation to the volume and page numbers of the decision in the I.D.'s would also be given.

[2] An opinion by the Assistant Solicitor, Branch of Land Appeals, prior to the creation of the Board of Land Appeals in July 1, 1970, *United States* v. *Johnson*, A-30191 (Apr. 2, 1965), held that Departmental decisions which are available for public inspection pursuant to published regulations were in accord with the provisions of the Administrative Procedure Act effective at that time even though they are not included in the volumes published as *Decisions of the Department of the Interior*. This is true today for decisions of the Board of Land Appeals.

otherwise not meeting the requirements of the Administrative Procedure Act for precedential opinions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed.

JOAN B. THOMPSON
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

JAMES L. BURSKI
Administrative Judge

FELL ENERGY COAL CORP.

2 IBSMA 34

Decided *March 28, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Nov. 7, 1979, decision of Administrative Law Judge David Torbett in Docket No. NX 9-99-R vacating Violation No. 1 of Notice of Violation No. 79-II-57-12, issued for failure to erect and maintain mine identification signs at all points of public access to the mine.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Signs and Markers

The requirement of 30 CFR 715.12(b) that mine and permit identification signs be maintained until the release of all bonds is violated if such signs are not present during an inspection and the permittee has not exercised reasonable diligence to maintain them.

APPEARANCES: Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., and John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On May 22, 1979, the Office of Surface Mining Reclamation and Enforcement (OSM), pursuant to the Surface Mining Control and Reclamation Act of 1977,[1] inspected an area in De Kalb County, Alabama, permitted by the State under permit number P-54 to Fell Energy Coal Corp. (the company). Mining had been completed at the site, but full revegetation was not yet achieved and the reclamation bond had not been released. OSM Inspector Dennis Winterringer issued Notice of Violation No. 79-II-57-12, containing two violations, to the company. Violation No. 2 was later vacated by OSM. Only Violation No. 1, failure to erect a mine and permit identification sign on an access road in violation of 30 CFR 715.12(b), is at issue.[2]

[1] 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

[2] As part of Violation No. 1 the notice also stated that "the sign should not be removed until after release of all bonds."

H. R. Fell, president of the company, requested review of this violation on Aug. 2, 1979. A hearing was held on Oct. 19, 1979, before Administrative Law Judge David Torbett, who ruled that Fell had erected a sign as required, had not removed the sign, and had visited the site with reasonable regularity. The decision concluded that the company should not be held responsible for the fact that the sign was not present at the time of the inspection.

Discussion and Conclusions

The evidence supports the findings that Mr. Fell had erected a sign on the mine's access road and that he had not removed it. However, the evidence does not support the finding that he or others in the company visited the site with reasonable regularity. Fell knew the sign was being removed (Tr. 9A, 10, 12, 14).[3] The sign was replaced twice, once by Mr. Fell in October or November 1978, and a second time by his superintendent before February 1979, when Fell last visited the property (Tr. 14, 15, 22).[4] The Federal inspection was held on May 22, 1979, some 3 months later. On that date no sign was in evidence. Moreover, Mr. Fell testified that he did not know whether a sign was up on Oct. 19, 1979, the date of the hearing (Tr. 18). Since he testified he last visited the site in February 1979 and that the last sign was erected before February 1979, the conclusion is inescapable that he either did not visit the site between February and October 19, a period of about 8 months, or, if he visited it after May 22, he did not replace the sign. This is neither reasonable regularity nor reasonable diligence.

[1] Mine and permit identification signs are required to be erected at all points of public access to the mine by 30 CFR 715.12(b).[5] These signs are not to be removed until the release of all bonds. Because the required sign was not present at the time of the inspection and the bonds had not been released, Violation No. 1 of the Notice of Violation was properly issued. Since the company did not exercise reasonable diligence in maintaining a sign, it cannot be excused from compliance with the statute and regulations.[6]

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[3] Mr. Fell wrote to OSM, complaining that the land owner had removed the signs (Tr. 9A). After the OSM Inspector testified that the owner denied this, Mr. Fell stated that his allegation was based on conjecture and that he did not know who removed the signs (Tr. 10, 12).

[4] On Mar. 7, 1979, an Alabama State inspector saw the sign (Tr. 22, 23). Although Fell saw the State inspector's report, there is no evidence as to when he saw it.

[5] Sec. 715.12(b) reads: "*Mine and permit identification signs.* Signs identifying the mine area shall be displayed at all points of access to the permit area from public roads and highways. * * * Such signs shall not be removed until after release of all bonds."

[6] Judge Torbett concluded that the mine operator is not an insurer and thus not responsible for absence of the sign due to acts of God or vandalism. Because of our holding herein, we need not and do not decide whether the permittee's responsibility is absolute, or if under different circumstances the violation might properly be vacated. Circumstances such as those suggested during the hearing might be considered in determining the amount of any civil penalty, if one is imposed.

Therefore, because the evidence indicates that there was a violation of 30 CFR 715.12(b), Violation No. 1 of Notice of Violation No. 79–II–57–12 should not have been vacated. That violation was properly issued and the decision of Nov. 7, 1979, is reversed.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

APPEAL OF NATIONAL INSTITUTE FOR COMMUNITY DEVELOPMENT, INC.

IBCA–1185–3–78

Decided *March 28, 1980*

Contract No. 68–01–0422, Environmental Protection Agency.

Denied.

1. Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: Allowable Costs—Contracts: Disputes and Remedies: Burden of Proof

Where a cost-plus-fixed-fee contractor has signed a contract amendment accepting the auditor's recommended overhead rates and no proof is offered to support claims for other disallowed costs, the Board finds there was a binding agreement on overhead rates and a failure to prove appellant's claims for other costs.

APPEARANCES: Mr. Lawrence J. Brailsford, President, National Institute for Community Development, Inc., Arlington, VA., for Appellant; Mr. Donnell L. Nantkes, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the contracting officer's decision to disallow $46,764 of costs under a cost-plus-fixed-fee contract. The appeal is submitted on the record. The appellant having vouchered for and been paid the disallowed costs, the Government is asking for repayment of them.

Background

Appellant was awarded a cost-plus-fixed-fee contract (AF–B)[1] on June 26, 1972, for the design, development, and implementation of an automated data storage and retrival system. The contract contained ceiling overhead rates. The contract was awarded by the Small Business Administration under authority of sec. 8(a) of the Small Business Act (15 U.S.C. § 637(a) (1976)). Appellant apparently is a minority

[1] All references are to the appeal file.

controlled firm. Modifications to the contract resulted in a final estimated cost of $1,241,275 and fixed fee of $101,572 for a total of $1,342,847. Performance was due to be completed in June 1974, but was actually completed in December 1974 (AF–G). After completion of the contract, the audit report (AF–G) questioned costs of $46,764. Of the total, $38,776 were questioned overhead costs which were applicable to disallowed direct costs or exceeded the contract ceiling overhead rates. Modification 10 to the contract incorporated the auditors recommended overhead rates for periods in which the actual rates were less than the ceiling rate and the ceiling rate for periods in which actual rates exceeded the ceiling. Modification 10 was executed by the Government on Mar. 31, 1977, and by appellant on Mar. 29, 1977.

Appellant filed a notice of appeal of the contracting officer's decision on Feb. 17, 1978. By letter of Apr. 28, 1978, appellant informed the Board of several allegations of Government duress in the award of the contract and of interference and direct negotiations and directives by Government personnel with one of its subcontractors. These two documents constitute the only documentation provided by appellant in support of the appeal.

Discussion and Findings

With regard to the disallowed overhead costs of $38,776, the appellant has not presented any evidence to challenge its acceptance of the final overhead rates established in Modification 10 to the contract. Therefore, we find that Modification 10 was a binding agreement between the parties, whereby the appellant agreed to accept the overhead amounts resulting from application of the agreed upon rates.

Regarding the remainder of the disallowed costs amounting to $7,988, the evidence before the Board is overwhelmingly against appellant. The audit report detailed each questioned cost and the contracting officer found the questioned costs to be unallowable. Appellant offers only two brief letters alleging improprieties in the award and administration of the contract, and protests that the refund of the disallowed costs would put appellant out of business and be inconsistent with the purposes of Federal encouragement of minority contracting programs.

Mere allegations are not proof.[2] Appellant has failed to provide any evidence to support its claim that the costs were improperly disallowed.

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[2] *Okland Construction Co., Inc.*, IBCA No. 871–9–70 (Mar. 23, 1971), 71–1 BCA par. 8766, and cases cited therein under n.14.

Therefore, we find that appellant's claim must fail for want of proof.

Conclusion

[1] Having found a binding agreement between the parties on disputed overhead costs and appellant's failure to prove its claim to other disallowed costs, the appeal is hereby denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR

WILLIAM F. MCGRAW
Chief Administrative Judge

U. S. GOVERNMENT PRINTING OFFICE : 1980 O - 317-795